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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

RONALD EARL STAHL, ET AL.,
Petitioners,

v.

THE STATE OF OKLAHOMA,
Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
OKLAHOMA COURT OF CRIMINAL APPEALS**

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QUESTION PRESENTED

Whether the First Amendment to the Constitution of the United States protects the press from criminal prosecution for trespassing where (a) reporters peacefully entered a nuclear power plant construction site for the sole purpose of observing and reporting a bona fide news event after demonstrators had already entered the same property, and (b) press access had been restricted by state authorities in an attempt to control and limit press coverage of the event.

LIST OF PARTIES

Ronald Earl Stahl, William A. Collard, Michael D. Kelley, Vicki Jean Monks, Ben Bernstein, and David P. McDaniel were defendants in the District Court of Rogers County and were appellants before the Oklahoma Court of Criminal Appeals.

The State of Oklahoma was plaintiff-appellee in all cases.

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**PETITION FOR A WRIT OF CERTIORARI TO THE
OKLAHOMA COURT OF CRIMINAL APPEALS**

Petitioners Ronald Earl Stahl, *et al.*, pray that a writ of certiorari issue to review the judgment of the Oklahoma Court of Criminal Appeals in this matter.

OPINIONS BELOW

The Findings of Fact and Conclusions of Law of the District Court of Rogers County are not officially reported, but are printed as Appendix B (App. 26a *et seq.*) hereto, and are unofficially reported at 5 Media L. Rep. 2313. The decision of the Oklahoma Court of Criminal Appeals from which certiorari is sought, dated June 22, 1983, is not yet officially reported, but is printed as Appendix A (App. 1a *et seq.*) hereto.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(3). The Oklahoma Court of Criminal Appeals' decision and judgment herein was rendered on

June 22, 1983. The Court of Criminal Appeals is the last court of appeal in Oklahoma for cases of this kind. 20 Okla. Stat. Ann. § 40 (1982 & Supp. 1983). On August 22, 1983, Justice White granted petitioners' timely application for an extension of time to file their Petition for a Writ of Certiorari, and authorized the petition to be filed up to and including September 20, 1983.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the Constitution of the United States provides, in pertinent part:

Congress shall make no law * * * abridging the freedom of speech, or of the press * * *.

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

No State shall * * * deprive any person of life, liberty or property, without due process of law * * *.

Section 1835(a) of Title 21, Oklahoma Statutes, provides:

Whoever shall willfully or maliciously enter the garden, yard, or enclosed field of another after being expressly forbidden to do so by the owner or occupant thereof shall be deemed guilty of trespass and upon conviction thereof shall be fined in any sum not to exceed Twenty-five Dollars (\$25.00); provided, that anyone who willfully or maliciously enters any such garden, yard, or field, and therein commits or attempts to commit waste, theft, or damage shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not less than Fifty Dollars (\$50.00) nor more than Five Hundred Dollars (\$500.00), or by confinement in the county jail for not less than thirty (30) days nor more than six (6) months, or both such fine and imprisonment.

Section 92 of Title 21, Oklahoma Statutes, provides:

The term "willfully" when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act or the omission referred to. It does not require any intent to violate law, or to injure another, or to require any advantage.

STATEMENT OF THE CASE

Because of a key finding by the trial court, not disturbed on appeal, the issue in this case is clearly defined as whether officials of a federally- and state-regulated nuclear power plant, acting in concert with local law enforcement authorities, may manipulate the flow of information to the public.

This issue grows out of the attempt by several bona fide members of the media harmlessly to enter upon the grounds of a construction site for a proposed nuclear power plant in order to witness a protest by a group opposed to further construction of nuclear power facilities. These reporters¹ crossed onto the Black Fox site solely to fulfill their professional obligation to the public to report the events that were to take place and not in any way to incite, abet, or further the demonstration otherwise taking place, nor to impede the efforts of law enforcement authorities to maintain order or apprehend the protestors. And their conviction for trespassing followed, not from an impartial effort to protect legitimate state and private interests through enforcement of the law of trespass, but from a carefully orchestrated effort by state authorities intentionally to minimize the likelihood of critical commentary upon their action by denying the media access to the site of the demonstration.

These reporters, petitioners here, have claimed throughout the proceedings below that the First Amendment for-

¹ In addition to petitioners, a number of other members of the media also entered the grounds at Black Fox; some were prosecuted for trespassing and others were not.

bade any such attempt by state officials to silence criticism by the press, and therefore to shield their actions from public scrutiny. Before describing the lower courts' treatment of petitioners' claim, and thereafter the reasons why this Court should consider that claim, it will be helpful if we first describe the events giving rise to these prosecutions, and the officials' motivations, *as found by the trial court*, for their actions.

The June 2, 1979 Demonstration

The Public Service Company of Oklahoma ("PSO"), in conjunction with two rural electrical cooperatives,² owns a 2,206 acre tract of land in Rogers County, Oklahoma, known as the Black Fox Station, where PSO was in the process of constructing a nuclear power plant at the time in question.³ This proposed plant had aroused "significant public controversy" (App. 39a), including extensive hearings by the Nuclear Regulatory Commission respecting the suitability of the site for a nuclear power plant. The proposed plant had also attracted protest from parties opposed to its construction, including a demonstration held eight months before during which protestors had entered the Black Fox grounds in an act of civil disobedience. This demonstration led to the prosecution of several protestors for trespassing, but the

² Associated Electric Cooperative, Inc., and Western Farmers Electric Cooperative.

³ By finding that there was state action in part because PSO is the recipient of substantial federal funds and subject to federal control (App. 28a-39a), the trial court in effect treated PSO's land as public property. The majority of the judges on the appellate court also seemed to assume that the property was public, because they relied on this Court's cases dealing with the use of public property (App. 5a, 6a-7a). The dissent concluded that the property was at least quasi-public (App. 18a-19a). While it would seem clear from this recitation that the property was public or quasi-public for purposes of constitutional treatment, we need not press the point in view of the arguments made here. Even if the property were private, a criminal conviction could not stand given the facts of this case.

charges were ultimately dismissed. Several reporters had also entered the Black Fox grounds to witness the demonstration, but none was prosecuted. The demonstration involved in the instant case occurred on June 2, 1979, and led to the prosecutions now before the Court.

PSO learned of the June 2 protest in advance and thereafter, in close coordination with local law enforcement authorities, took steps to plan for it (App. 41a). As part of this preparation, PSO officials, including Harvey E. Sollars, PSO's Security Coordinator for Black Fox, met on several occasions with Rogers County Sheriff Angus Ward and Deputy Sheriff Fritz Freeman. PSO officials discussed with these law enforcement officials the manner by which the protestors would be handled and recommended that the sheriff issue citations rather than make custodial arrests (a plan ultimately followed by the sheriff). In addition, PSO officials prepared a detailed "Occupation Plan" (App. 42a) for the demonstration that included the various options for apprehending any trespassing parties as well as certain announcements the sheriff was to make (App. 42a). Because, as the trial court found, "PSO had been unhappy with the press coverage of the October 1978 protest and wished to limit press coverage of the June protest" (App. 42a), PSO also developed a plan for limiting press coverage of the demonstration, restricting the press to a "public viewing area" a mile from the point at which the protestors later entered.⁴ This plan would have effectively killed any timely press coverage of the event. Moreover, the purpose of this restriction was to prevent the media from being able to witness the demonstration. As the trial court found: "The purposes for such limitation included [(a)] preventing the protestors from 'collecting publicity,' based on PSO's belief that the demonstration did not 'deserve the kind of importance or legitimacy that

⁴ PSO did not know where the protestors would enter Black Fox and whether the press and public could view the demonstration from the designated viewing area (App. 43a).

debate and news coverage would give it' * * * and [(b)] preventing the media participation in the trespass march and 'close-up shots, interviews and battle shouts by the marchers'" (App. 42a-43a; record references omitted).

On the morning of June 2, 339 members of the Sunbelt Alliance, followed by petitioners and other reporters who were present solely to witness the demonstration, entered the Black Fox property and, after being admonished by a PSO official to leave, were arrested by the sheriff. Neither the place where the demonstrators entered Black Fox nor the place where they were arrested could be observed from the designated viewing area or from outside the fence forming the perimeter of the site (App. 46a).⁵ Petitioners were cited for trespass, despite the fact that they had not interfered with any construction activity at the site or with any action of the sheriff in arresting the members of the Sunbelt Alliance (App. 47a-48a).

The Lower Court Proceedings

After their arrest and citation, petitioners were prosecuted before the District Court of Rogers County for trespassing after being warned in violation of Okla. Stat. Ann. tit. 21, § 1835(a). Tried without a jury, petitioners were convicted and were each fined \$25.00. Ironically, the demonstrators prosecuted for trespassing were discharged after their trial resulted in a hung jury.

In a post-trial ruling on petitioners' motion to dismiss, the District Court rejected petitioners' First Amendment claims and entered findings of fact and conclusions of law on the issue (App. 26a-69a). The court first concluded that PSO's actions in connection with the June 2 demonstration constituted state action for the purposes of

⁵ Roughly 15-20 reporters had attempted to observe the events from the viewing area. Finding that vantage unworkable, however, they asked for, and were granted, permission to move closer to the demonstration site, and were taken to a position 30 yards from the site. However, they still were not able to see all of the unfolding events even from this position (App. 46a).

the federal and state Constitutions (App. 48a-49a). The court based this conclusion upon the extensive regulatory control and financial support of PSO by several federal and state regulatory agencies (App. 49a; *see id.* at 28a-39a), as well as upon the "working relationship" that had existed between PSO and law enforcement authorities with respect to their combined efforts to control arrest, and book the demonstrators and petitioners (App. 49a; *see id.* at 41a-43a, 48a).

On the merits, the District Court recognized that "a right of reasonable access to newsworthy events exists under the protection of the First Amendment" (App. 52a), but ruled that petitioners' convictions were nonetheless valid. As noted above, the court expressly found that "[t]he intent of PSO in exercising restrictions on the press was admittedly to limit the content of the news which would be later distributed by the media" (App. 53a)—a design the court characterized as "ignoble" and "hardly compatible with the rights of a free people" (App. 53a). Nevertheless, the court concluded that, on balance, the restrictions imposed upon petitioners by PSO and the police were minor, and any burden resulting therefrom was outweighed by the state's interests in protecting PSO's property and in maintaining order at the demonstration site (App. 54a-55a).

On June 22, 1983, over three years later, the Oklahoma Court of Criminal Appeals, by a 2-1 vote, affirmed the judgment of the Rogers County District Court. First, the court concluded that petitioners had violated Okla. Stat. Ann. tit. 21, § 1835(a) (West Supp. 1982-1983), by entering the PSO property at Black Fox (App. 2a-3a, 15a). In so doing, the court rejected the argument that, because of the substantial First Amendment issues present in the case, a higher *mens rea* than simple wilfulness, as defined by Okla. Stat. Ann. tit. 21, § 92 (West 1958) (see pp. 2-3, *supra*), was required to sustain a conviction under Section 1835(a) (*see* App. 2a-3a).

Turning to petitioners' First Amendment claims, the majority, over Judge Brett's dissent, rejected the argument that the First Amendment protected reporters against a criminal prosecution for peacefully entering upon public property for the limited purpose of observing, and thereafter reporting, the demonstration held by the Sunbelt Alliance at Black Fox (App. 4a-7a). At the outset, the majority noted, and did not disapprove, the District Court's express finding that "a sufficiently close nexus existed between the actions of PSO and the state and federal governments to fairly treat the actions of PSO as the actions of government itself" (App. 4a). Furthermore, the majority did not disapprove the District Court's finding that PSO had structured its handling of the media on the day of the demonstration for the express purpose of avoiding what it perceived would be critical medial coverage of the event (App. 53a).⁶ Instead, the majority ruled that these findings were irrelevant because, as a matter of law, petitioners' First Amendment claims lacked merit (App. 5a).

Relying upon PSO's general media access policy, rather than the specific motives prompting PSO on the day in question, the majority concluded that PSO needed to regulate access to its facility by the media to avoid accidents and vandalism by entrants (App. 5a). The majority concluded, by relying upon a variety of decisions in which the press actively attempted *itself* to provide the newsworthy events (App. 5a-6a), that the press enjoyed no First Amendment protection for its newsgathering function where the need to obtain information required the press to commit the technical tort of trespass (*id.*). Finally, the majority ruled that

⁶ To the contrary, the majority noted that "there is evidence that the overall PSO press arrangements for the June event were based in part on a desire to minimize the effectiveness of the demonstration * * *" (App. 5a).

neither the press nor the public had any right of access to the PSO facility because it was neither a public street, sidewalk, nor park (App. 6a-7a).

In dissent, Judge Brett, relying almost exclusively upon numerous First Amendment decisions of this Court (App. 16a-23a), concluded that the convictions violated the Oklahoma state constitutional guarantee of freedom of the press, and he therefore would have reversed the convictions on this ground alone, without having to resort to the First Amendment (App. 10a).⁷ Interpreting this Court's decisions respecting access by the press and public to government information, Judge Brett concluded that "any press access claim to government information is subject to a degree of restraint dictated by" a balancing test which measures the nature of the forum and information sought against the countervailing government interests (App. 17a), and which also takes into consideration "the purpose and motive behind the abridging action" (App. 18a). Performing that balance, he concluded that the state's interest in prosecuting petitioners to maintain order was speculative at best, and was, in fact, belied by the District Court's express findings that petitioners were in no danger from construction hazards and the demonstration was entirely peaceful (App. 20a-21a).⁸ He also rejected the state's asserted need to protect PSO's property because, as the District Court had found, PSO had no reason to believe, and did not in fact believe, that the reporters' presence would cause any harm to Black Fox

⁷ Judge Brett's reliance upon this Court's decisions as authority for his interpretation of the analogous Oklahoma constitutional provision (*see* App. 10a n.1), however, strongly suggests that he would have grounded his decision in the First Amendment had he been forced to reach that issue (*see* App. 17a).

⁸ "It could be argued that the presence of the press, by assuring full accountability, diminished the possibility of a violent confrontation and very possibly assured that everything remained peaceful" (App. 21a).

or the facilities there (App. 22a). Finally, he also concluded that "the illegitimate purpose of controlling the kind of news story the press would later distribute to the public" (App. 23a) undermined any claim that the restriction qualified as a valid regulation of the time, place, or manner of petitioners' access. Accordingly, he concluded that, on the facts of this case, the convictions were constitutionally flawed.*

STAGES AT WHICH THE FEDERAL QUESTIONS WERE RAISED AND PRESERVED

Petitioners raised and argued the First Amendment question presented herein before the District Court of Rogers County and the Oklahoma Court of Criminal Appeals, and both bodies specifically ruled on the issues (App. 3a-7a, 50a-55a).

REASONS FOR GRANTING THE PETITION

This case presents the Court with a rare opportunity. Demonstrations are increasing in number, size, variety, and importance in this country. All of the problems attendant upon covering them by the media are similarly increasing. Yet, because of the confused and often hostile atmosphere in which demonstrations take place, courts seldom are able to sort out just what occurred, much less the motivations of those in charge of policing them. It is extremely difficult, therefore, for this or any court to lay down guidelines for the press in its attempt to do its job when these demonstrations occur.

In this case, however, the trial court was able to determine with particularity all of the surrounding facts,

* "I do not say that the press has an absolute right to go on public property to gather news. I would only hold that our criminal trespass statute cannot be used arbitrarily and unreasonably to exclude the press from their constitutionally protected news gathering role on public property when the State does not present a legitimate or important countervailing interest" (App. 24a).

and it was also able to pinpoint just why the authorities acted as they did. For example, its findings, taken as a whole, clearly establish that petitioners:

- did not originate the idea, design or plan of the demonstration;

- did not create the incident or take the lead in any part of it;

- followed rather than led others onto the property;

- did not join and were never participants in the demonstration;

- neither instigated nor incited the participants;

- did not engage in ruse or subterfuge in order to gain entry to the property;

- entered the property as quietly and peaceably as the circumstances would allow;

- did not impede or interfere with the policing of the demonstration;

- were never obstreperous, boisterous, vocal, or unruly;

- did not damage the property or harm any person;

- entered the property solely for the purpose of covering the news event, and

- did not falsely report the event.

The trial court was also able to pinpoint the motivations of local officials: to control and diminish media coverage because of *their* judgment that the news event would be over-publicized and, presumably, embarrassing to them and to nuclear power.

Thus, this case represents a rare opportunity to spell out what the rights and privileges are of the press and public, and what the limitations are on the exercise of state action, in the increasingly volatile area of public demonstrations.

A number of distinct but allied lines of decision intersect at the facts of this case.

The Court has recognized, for example, that reasonable regulations of the time, place or manner of communication are valid only so long as those restrictions are not based upon the content or subject matter of speech. *See, e.g., Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 535-537 (1980). The Court has also ruled that newsgathering by the media is entitled to some degree of constitutional protection. *E.g., Branzburg v. Hayes*, 408 U.S. 665, 681, 707 (1972); *Pell v. Procunier*, 417 U.S. 817, 833 (1974). More recently, in the context of public trials, the Court has given life to the doctrine that the First Amendment affords some measure of constitutional protection to the public and to its agent, the press, with regard to the obtaining of information necessary for informed public decisionmaking. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Globe Newspaper Co. v. Superior Court*, 102 S. Ct. 2613 (1982). And numerous lower federal and state courts have ruled that otherwise-applicable state trespass laws must give way in the face of more important public interests, like those present here. *See cases collected at 67 Op. Md. Att'y Gen. No. 82-024 (July 19, 1982).*

The instant case presents elements of each of these doctrines and represents the logical next step in their development.

1. Thus, for example, the restrictions on the press in this case cannot be justified on the ground of prevention of violence. This is so not only because violence was not present or imminent but because the motivation for the restrictions was otherwise. The reason the press was restricted was so that publicity would be curtailed. There could hardly be a restriction more directly related to the content of speech than this one. Surely, if the police had said to petitioners, "You can enter the property only so long as you agree not to publish," or "• • • only so long as you agree to report the event in a favorable light," or

"* * * only so long as we can approve in advance what you write," there would be no question but that the restriction would be struck down. Yet the situation here is really no different in purpose and effect. The authorities having determined that (a) they did not wish unfavorable publicity; (b) the demonstration was, in their eyes, an untoward event; and, therefore, (c) any publicity surrounding the event was bound to be unfavorable, they simply precluded the press from following and covering the event on pain of criminal prosecution. This is the very type of censorship precluded by the *Consolidated Edison* line of cases.¹⁰

2. Well before *Richmond Newspapers* and *Globe Newspaper* explicitly anchored in the First Amendment the public's interest in obtaining from government information essential for participatory democracy, this Court had often recognized that the central and overriding subject of the First Amendment was its protection of the public's free discussion and receipt of information and opinions respecting government. See, e.g., *Mills v. Alabama*, 384 U.S. 214 (1966). Having pointed to "the paramount public interest in a free flow of information to the people concerning public officials, their servants" (*Garrison v. Louisiana*, 379 U.S. 64, 77 (1964)), the Court took steps to make certain that this interest was neither arrested nor chilled by prior restraints, civil damage suits, or after-the-fact criminal prosecutions. See, e.g., *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Garrison v. Louisiana*, *supra*. Moreover, the Court had also ensured that public discussion of the criminal process—indisputably, the function of government most coercive of its citizens and, therefore, most in need of scrutiny—would be wholly

¹⁰ Since the state may not enact, it a *fortiori* may not enforce, a statute with the intent to censor or penalize the press for performing its constitutionally recognized function. *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 103 S. Ct. 1365, 1369-75 (1983); *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936).

unfettered, absent the most exacting showing of need to limit debate. *See, e.g., Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979) (publication of juvenile records); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (publication of the names of victims); *Craig v. Harney*, 331 U.S. 367 (1947) (criticism of ongoing trial).

Richmond Newspapers reinforced and augmented that protection by assuring that the public would have access to the information necessary to meaningful discussion of government. Consistent with the Framers' belief that public access to information respecting such matters was essential to participatory democracy,¹¹ *Richmond Newspapers* and *Globe Newspaper* recognized that the structural role played by the First Amendment in protecting public oversight of government affairs entitled the public and press to attend criminal trials. These decisions bar the government from shutting off the public's access to this aspect of the criminal process absent a compelling governmental interest, expressed in specific findings to that effect, narrowly tailored to serve that particular interest. *Globe Newspaper*, 102 S. Ct. at 2619-20; *Richmond Newspapers*, 448 U.S. at 580-581 (plurality opinion); *id.* at 597-598 & n.24 (Brennan, J., concurring in the judgment).

These cases acknowledged that, at least with respect to the most open facet of the criminal process, the First

¹¹ *See, e.g., Proposed Bill for the More General Diffusion of Knowledge* (T. Jefferson), reprinted in 2 *The Writings of Thomas Jefferson* 220-221 (P. Ford ed. 1893) ("[W]hereas * * * experience hath shewn, that even under the best forms, those entrusted with power have, in time, * * * perverted it into tyranny; * * * it is believed that the most effectual means of preventing this would be, to illuminate, as far as practicable, the minds of the people at large * * *"); Letter from James Madison to W.T. Barry, Aug. 4, 1822, in 9 *Writings of James Madison* 103 (G. Hunt ed. 1910) ("A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives").

Amendment not only protects the public's ability to engage in discourse but also ensures that the governmental institutions responsible therefore are kept within the ambit of public scrutiny. In this case, the question is whether the public, or the press as agent of the public, has a similar right of access to the information necessary to form responsible judgments about the actual operation of an anterior stage of that process.

3. (a) This question is of substantial interest to the public and is of especial interest to the press because of the media's institutional role in obtaining and disseminating information to the public. The wisdom, and often-times the legality,¹² of the decision to commit the Nation's resources to, and subject future generations to the hazards of, nuclear power are, of course, matters of intense legislative, administrative, and scholarly debate.¹³ Often-times, the parties attempting to influence the outcome of that debate resort to drastic means to make their position heard. Demonstrations of the type that took place on PSO's Black Fox property are not isolated incidents.¹⁴

¹² See, e.g., *Baltimore Gas & Elec. Co. v. NRDC*, 103 S. Ct. 2246 (1983); *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Development Comm'n*, 103 S. Ct. 1713 (1983); *Duke Power Co. v. Carolina Env'tl Study Group, Inc.*, 438 U.S. 59 (1978).

¹³ See, e.g., *NRDC v. NRC*, 685 F.2d 459, 525-526 n.60 (D.C. Cir. 1982) (Wilkey, J., concurring in part and dissenting in part) (collecting administrative and legislative studies of the problems of nuclear waste disposal), *rev'd sub nom. Baltimore Gas & Elec. Co. v. NRDC*, *supra*; *Report of the Energy Project at the Harvard Business School* 127-166 (R. Stobaugh & D. Yergin eds. 1979); S. Glasstone & W. Jordan, *Nuclear Power and its Environmental Effects* (1980).

¹⁴ For example, recent television footage of protestors pushing through the gates and onto the grounds of the Russian Consulate in Glen Cove, New York, following the shooting down of a Korean passenger plane, showed television cameramen being virtually carried onto the property in the midst of the crowd. Regardless of how one views this forced entry, it was certainly a newsworthy event that warranted coverage. And it (a) the police had used excessive force against the protestors once they were inside the

To the contrary, such assemblies, whether performed on government property or in the streets and parks, whether accomplished under a permit or by means of trespass, and whether accompanied by violence or done entirely peacefully, have become an established part of the domestic political scene since the Boston Tea Party in 1773, and increasingly so in recent years.

While demonstrations like that taking place at Black Fox are normally peaceful and do not involve the participants' trespass upon public property, that is not always the case. But the need for complete information as to the actions of the participants in expressing their views, and the police in attempting to control the protest or squelch a disturbance, is the same. Demonstrations involving trespassing are of no less importance to the public than those occurring entirely and lawfully upon the public streets and parks. Whether civil disobedience is seen as enobling or sullyng a speaker's cause, the fact of that disobedience is plainly of importance to the public debate over a governmental issue, particularly one of such pressing importance as is the issue underlying the events at Black Fox. The question presented by this case, therefore, is one never before fully addressed by the Court but one which nevertheless is likely to recur with increasing regularity. It is of sufficient public importance to warrant this Court's review, particularly since it occurs against the background of an alleged "offense" that already stretches constitutional limits.¹⁵

grounds, or (b) the protestors had wantonly destroyed property, that too should have been covered even if it meant the reporters had to follow the crowd.

¹⁵ The Court of Criminal Appeals, in response to the argument that petitioners "lacked the requisite criminal intent since they entered the land only to gather news, not to violate the rights of the landowners or engage in other unlawful behavior" (App. 2a), concluded that petitioners "need not have intended to violate any laws or injure the landowner in order to have committed trespass" (App. 3a). As thus interpreted, Oklahoma's criminal trespass statute does

(b) Limited public or press access to property to observe police regulation of demonstrations is also necessary to afford the public the opportunity to engage in effective oversight of police practice in handling such matters. Access to criminal trials is plainly insufficient in this regard. The everyday role of the police in maintaining order generally escapes judicial scrutiny because the obstacles to litigation over such police practices have limited judicial review typically to only those aspects relating to the acquisition of prosecution evidence.¹⁶ For various reasons,¹⁷

not require any evil intent. Rather, it merely requires the antecedent intent to commit an act.

This Court has stated that "[c]riminal liability is normally based upon the occurrence of two factors, 'an evil meaning mind [and] an evil-doing hand . . .'" *United States v. Bailey*, 444 U.S. 394, 402 (1980), citing *Morisette v. United States*, 342 U.S. 246, 251 (1952). Thus, in *Smith v. California*, 361 U.S. 147 (1959), the Court noted that while states are free to create strict criminal liability by dispensing with a scienter element, there still exist constitutional limitations on the exercise of their police power, particularly where the elimination of a scienter requirement "may tend to work a substantial restriction on the freedom of speech and of the press." *Id.* at 150. See also *Bowie v. City of Columbia*, 378 U.S. 347, 358 (1964) ("[u]nless a trespass is 'committed under such circumstances as to constitute an actual breach of the peace, it is not indictable at common law, but is to be redressed by a civil action only'"; emphasis in original); *Martin v. City of Struthers*, 319 U.S. 141, 147-149 (1943) (ordinance making it unlawful trespass to knock on doors and ring doorbells to distribute literature held in conflict with freedom of speech and press).

These same constitutional guarantees should prevent the State of Oklahoma from imposing criminal sanctions on reporters who had no evil intent to trespass or even to participate in a demonstration, but who merely intended to follow the course of events as they were occurring and report accurately thereon.

¹⁶ See, e.g., Amsterdam, *The Supreme Court and the Rights of Suspects In Criminal Cases*, 45 N.Y.U.L. Rev. 785, 786-788 (1970); Goldstein, *Administrative Problems in Controlling [sic] the Exercise of Police Authority*, 58 J. Crim. L.C. & P.S. 160, 168 (1967). See also *Rizzo v. Goode*, 423 U.S. 362 (1976).

¹⁷ See, e.g., *Rawlings v. Kentucky*, 448 U.S. 98 (1980); *United States v. Salvucci*, 448 U.S. 83 (1980); *Rakas v. Illinois*, 439 U.S.

the instances in which *Richmond Newspapers* and *Globe Newspaper* ensure that the public's oversight of the criminal process will be adequate are often quite restricted. In addition, the likelihood that any police practices giving rise to litigated issues will be open to the public is lessened further still by the commonplace practice of litigating such matters at pretrial suppression hearings, from which the public is frequently excluded. See *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979). Finally, the deficiencies in tort remedies, whether for damages or injunctions, as a supplement to the exclusionary rule are, by now, well-known,¹⁸ and are therefore unlikely to bring to light a significant, additional number of instances of police illegality.

At the same time, however, the public need for complete information as to the nature and extent of such law enforcement operations cannot be underestimated. A number of factors—including the decentralized nature of most police functions¹⁹ and, in some instances, the racial animus prompting or caused by such activity²⁰—manifest a need for public oversight of such day-to-day police functioning. Since the citizenry is ultimately responsible for the enactment of the penal laws enforced by the police, the public, in order effectively to discharge that responsibility, must be able to obtain complete and accurate information respecting the actual conduct of police affairs. This is

128 (1978); *United States v. Caceres*, 440 U.S. 741 (1979). See also *United States v. Payner*, 447 U.S. 727 (1980).

¹⁸ See, e.g., *Los Angeles v. Lyons*, 103 S. Ct. 1660 (1983); *Rizzo v. Goode*, *supra*; *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 421-422 (1971) (Burger, C.J., dissenting). See also Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 360 (1974); Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 Minn. L. Rev. 493 (1955).

¹⁹ See, e.g., K. Davis, *Discretionary Justice* 222 (1969).

²⁰ See, e.g., *National Advisory Comm'n on Civil Disorders*, Report 93 (1968); *The President's Comm'n on Law Enforcement and Administration of Justice*, Task Force Report: *The Police* 146-148 (1967); *President's Comm'n on Crime in the District of Columbia*, Report on the Metropolitan Police Dep't 62-65 (1966).

particularly true where, as here, there exists the chance that the police may be called upon to exercise force in response to the actions of fellow citizens over which the government has granted the police a monopoly. The need for the public to make informed judgments with regard to such matters, we submit, outweighs the incremental and, in this case, nonexistent burden upon state interests resulting from the harmless actions of petitioners in entering upon the Black Fox grounds.

(c) Petitioners do not claim that their right of access to the grounds at Black Fox is absolute or that anyone claiming an interest in the events taking place in circumstances like those here is entitled to access for any reason. Petitioners do not dispute the state's need to maintain order and prevent violence, and do not challenge the state's interest in protecting the rights of property owners. Petitioners' claim is quite narrow. There is no claim in this case of a First Amendment right to enter public or private property at all times and under all circumstances. Nor is there any question as to the power of law enforcement authorities to prohibit access during riots or other institutional emergencies, or to prohibit interviews with persons who are dangerous or who present other similar, specific problems. None of those circumstances obtained at Black Fox on June 2, and the Court's decision here therefore need not take into account the state's interests in such circumstances.

This case, therefore, does not involve a myriad of problems raised in other cases dealing with press access, including invasions of privacy,²¹ interference with the conduct of a trial,²² attempts to obtain national security information,²³ and a reporter's active participation in an

²¹ Compare *Commonwealth v. Wiseman*, 249 N.E.2d 610 (Mass. 1969), cert. denied, 398 U.S. 960 (1970).

²² Compare *Estes v. Texas*, 381 U.S. 532 (1965).

²³ Compare *Zemel v. Rusk*, 381 U.S. 1, 16 (1965).

incident himself in order to create a news story that would not otherwise exist.²⁴

What petitioners do claim is the right to reasonable access to property peacefully to witness a newsworthy demonstration that has already entered upon the property, absent other exigent circumstances. And, in particular, they claim the right to be free from restraints upon such access which are specifically designed to impede their public function of gathering news about matters of public concern—an intent on the part of authorities rightfully labeled “ignoble” by the trial court. The question presented here can therefore be decided quite narrowly, despite its extraordinary importance.

CONCLUSION

For each of the reasons outlined above, we urge the Court to grant certiorari and reverse the judge of the Oklahoma Court of Criminal Appeals.

Respectfully submitted,

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²⁴ Compare *Branzburg v. Hayes*, *supra*.

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No. 83-

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

RONALD EARL STAHL, ET AL.,
Petitioners,

v.

THE STATE OF OKLAHOMA,
Respondents.

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI TO THE
OKLAHOMA COURT OF CRIMINAL APPEALS

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APPENDIX A

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

No. M-80-326

No. M-80-377

No. M-80-328

RONALD EARL STAHL, WILLIAM A. COLLARD, AND
MICHAEL D. KELLY, VICKI JEAN MONKS, BEN BERNSTEIN,
MARK RAYMOND EMERSON, DAVID P. MCDANIEL,
ELI W. NIXON AND STEVE WOLFSON,
Appellant,

—vs—

THE STATE OF OKLAHOMA,
Appellee.

[Filed June 22, 1983]

OPINION

CORNISH, Judge:

Appellants are nine newsmen convicted in a non-jury trial of Trespass after Being Forbidden, in violation of 21 O.S.1971, § 1835. Each was fined \$25.00.

The pivotal issue in this appeal is whether the First Amendment shields newsmen from state criminal prosecution on their news gathering function. We hold that it does not.

Black Fox Station is a 2,206 acre tract of land in Rogers County, Oklahoma, owned by the Public Service Company of Oklahoma (PSO), an Oklahoma corporation. PSO and two rural electric cooperatives, Associated Elec-

tric Cooperative, Inc. (Associated) and Western Farmers Electric Cooperative (Western), agreed to develop nuclear power generating facilities on the site. Some initial excavation and construction work was commenced under a limited work authorization issued by the Nuclear Regulatory Commission.

On June 2, 1979, members of the Sunbelt Alliance, a group, whose goal it was to display their opposition to the proposed nuclear facility, occupied the grounds at Black Fox. The appellant newsmen crossed the fence with the protestors, despite PSO's previously announced intention to have such persons arrested, and despite signs posted on the fence and loudspeaker warnings. All 339 demonstrators and the nine appellants were arrested and booked by the Rogers County sheriff.

It is argued that appellants lacked the requisite criminal intent since they entered the land only to gather news, not to violate the rights of the landowners or engage in other unlawful behavior. It is also argued that appellants must be shown to have actually caused significant damage to a real property interest, or a breach of the peace to be guilty of the offense of trespass.

Title 21 O.S.1981, § 1935(a) provides:

Whoever shall willfully or maliciously enter the garden, yard, or enclosed field of another after being expressly forbidden to do so by the owner or occupant thereof shall be deemed guilty of trespass and upon conviction thereof shall be fined in any sum not to exceed Twenty-five Dollars (\$25.00); provided, that anyone who willfully or maliciously enters any such garden, yard, or field, and therein commits or attempts to commit waste, theft, or damage shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not less than Fifty Dollars (\$50.00) nor more than Five Hundred Dollars (\$500.00), or by confinement in the county jail

for not less than thirty (30) days nor more than six (6) months, or both such fine and imprisonment.

Regarding the requisite *mens rea*, the word "willfully" is defined as follows:

The term "willfully" when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act or the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage.

Title 21 O.S.1981, § 92. It is thus manifest that appellants need not have intended to violate any laws or injure the landowner in order to have committed trespass. Moreover, it is apparent that actual damage is not an element of the offense under the first part of § 1835(a). Trespass resulting in waste, theft or damage is treated separately in the proviso, and is subject to a greater range of punishment.

Appellants contend that these convictions are in violation of the First and Fourteenth Amendments to the United States Constitution. To sustain such a claim, a showing of government action, state or federal, is necessary.

We do not agree with our dissenting colleague that the validity of these convictions under the Oklahoma Constitution is properly before this Court. Any such claim has been waived in the briefs. Only one of the nine appellants makes any contention in this regard, and that by the obscure statement that the convictions violate the First Amendment "and the cognate provisions of the Oklahoma Constitution". Reply Brief of Appellant Monks, p. 33. Appellants' statement of the issue and the authority relied upon are grounded solely on the First Amendment.

However, the dissent does not differentiate under the facts of this case the protections provided by the Okla-

homa Constitution from those provided by the First Amendment. Rather, the rights guarded are treated as co-extensive, with First Amendment caselaw controlling. Thus, the difference in results is not due to analysis under one constitutional provision instead of the other.

The trial court found that a sufficiently close nexus existed between the actions of PSO and the state and federal governments to fairly treat the actions of PSO as the actions of government itself. See *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974). The trial court further found that PSO's partners in the project, Associated and Western, were instrumentalities of the federal government, and that PSO acted on behalf of the partners. See, *Alabama Power Company v. Alabama Electric Cooperative, Inc.*, 394 F.2d 672 (5th Cir. 1978), cert.den., 393 U.S. 100, 89 S.Ct. 488, 21 L.Ed.2d 465, (rural electric cooperatives are federal instrumentalities under the anti-trust laws). But see, *City of Paris, Kentucky v. Federal Power Commission*, 399 F.2d 983 (D.C.Cir. 1968) (rural electric cooperatives are not federal instrumentalities under the federal power act).

The State does not challenge these findings. It is unnecessary for us to determine whether state action is present in each of these forms since the constitutional claim is unavailing on its merits. Appellants urge that they have been denied their constitutional right to gather the news. They argue that they had a constitutional right to cross the fence and accompany the protestors in order to adequately cover the event absent a sufficient countervailing state interest.

On June 2, 1979, the grounds of Black Fox were closed to both press and public, except for a designated public viewing area (PVA) near the center of the site. PSO's general policy was that persons desiring to visit the site must enter at one of the gates. The visitor could then proceed directly to the PVA, or request permission to visit

other portions of the site. Such permission normally involved an escort for the visitor while on the grounds. Those violating the policy by entering the property through the fence were subject to arrest.

The policy was based on the need to avoid harm to visitors due to ditches and holes on the property and the roads. There was also the danger posed by heavy equipment utilized in construction activity on the site. An additional factor leading to this policy was the need to avoid vandalism to the site and to the heavy equipment kept therein.

Although there is evidence that the overall PSO press arrangements for the June event were based in part on a desire to minimize the effectiveness of the demonstration these newsmen were arrested for crossing the fence and entering the grounds in violation of a policy supported by valid considerations. Governmental entities are empowered to regulate property under their control in order to preserve the property for the use to which it is lawfully dedicated. *Greer v. Spock*, 424 U.S. 838, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976); *Adderly v. Florida*, 385 U.S. 39, 87 S.Ct. 242, 17 L.Ed.2d 149 (1966). The basic function of the Black Fox Station was to house nuclear power generating facilities. In order to efficaciously administer the property, PSO needed to regulate the entrance of visitors to the facility.

The First Amendment does not shield newsmen from liability for torts and crimes committed in the course of news-gathering. See *Galella v. Onassis*, 487 F.2d 986 (2nd Cir. 1973); *Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971); *Anderson v. WROC-TV*, 109 Misc.2d 904, 441 N.Y.S.2d 220 (1981); *Prahl v. Brosamle*, 98 Wis.2d 130, 295 N.W.2d 768 (1980). In *Le Mistral, Inc. v. Columbia Broadcasting*, 61 A.D.2d 491, 402 N.Y.S.2d 815, 817 (1978), the court reviewed the applicable law:

In *Dietemann v. Time, Inc.* 449 F.2d 245, 249 (9th Cir. 1971), it was observed that '[t]he First Amend-

ment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering. The First Amendment is not a license to trespass . . . ' Similarly, the Second Circuit Court of Appeals in *Galella v. Onassis*, 487 F.2d 986, 995-996, stated:

'Crimes and torts committed in news gathering are not protected. See *Branzburg v. Hayes*, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972); *Rosenbloom v. Metromedia*, 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971); *Dietemann v. Time, Inc.*, 449 F.2d 245, 249-250 (9th Cir. 1971). See RESTATEMENT OF TORTS 2d § 652(f), comment K (Tent. Draft No. 13, 1967). There is no threat to a free press in requiring its agents to act within the law.'

Further, the First Amendment does not guarantee the press a constitutional right of special access not available to the public generally. *Branzburg v. Hayes*, 408 U.S. 665, 684, 92 S.Ct. 2646, 2658, 33 L.Ed.2d 626 (1972); *Houchins v. KQED, Inc.*, 438 U.S. 1, 98 S.Ct. 2588, 57 L.Ed.2d 553 (1977) (Burger, C.J.; and Stewart, J., concurring in the judgment); *Pell v. Procunier*, 417 U.S. 817, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974). Moreover, this property is not a traditional public forum such as public streets, sidewalks, and parks, and there is no constitutional guarantee of access:

[T]he First Amendment does not guarantee access to property simply because it is owned or controlled by the government. In *Greer v. Spock*, 424 U.S. 828, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976), the Court cited approvingly from its earlier opinion in *Adderley v. Florida*, 385 U.S. 39, 87 S.Ct. 242, 17 L.Ed.2d 149 (1966) wherein it explained that 'The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.' 424 U.S. 828, 836, 96 S.Ct. 1211, 1216, 47 L.Ed.2d 505.

U.S. Postal Service v. Council of Greenburgh Civic Associations, 453 U.S. 114, 129-130, 101 S.Ct. 2676, 2685, 69 L.Ed.2d 517 (1981).

Appellants were subjected to a rule of access applying to both press and public alike. This rule was supported by sufficient policy considerations. The judgments and sentences are AFFIRMED.

AN APPEAL FROM THE DISTRICT COURT
OF ROGERS COUNTY, OKLAHOMA
THE HONORABLE DAVID ALLEN BOX,
SPECIAL JUDGE

Appellants, RONALD EARL STAHL, WILLIAM A. COLLARD, MICHAEL D. KELLY, STEVE WOLFSON, VICKI JEAN MONKS, ELI NIXON, MARK EMERSON, DAVID MC DANIELS, AND BEN BERNSTEIN, were convicted of Trespassing After Being Forbidden, 21 O.S.1971, § 1835, in the District Court of Rogers County, consolidated cases CRM-79-373, 407, 437, 512, 540, 547, 561, 635, 681, were fined Twenty-five Dollars (\$25.00), and all appeal. AFFIRMED.

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OPINION BY CORNISH, J.,
BUSSEY, P.J., CONCURS
BRETT, J., DISSENTS

BRETT, Judge:

I respectfully dissent to this decision.

The appellants in Case No. M-80-326, Stahl, et al., (Consolidated cases CRM-79-407, 512, 635), Case No. M-80-328 Bernstein, et al., (Consolidated cases CRM-79-373, 407, 437, 512, 540, 547, 561, 635, and 681 and Case No. M-80-377, Monks, et al., (Consolidated Cases CRM-79-373, 407, 437, 512, 540, 547, 561, 635 and 681), are nine newsmen who were convicted of the misdemeanor offense of Trespassing After Being Forbidden, in violation of 21 O.S. 1971, § 1835, in the District Court of Rogers County before the Honorable David Allen Box, without a jury. The nine cases were consolidated for trial and each appellant received a twenty-five (\$25) dollar fine. It is from this conviction for criminal trespass that the nine appellants herein appeal.

The criminal trespass statute in question provides:

Whoever shall willfully or maliciously enter the garden, yard, or enclosed field of another after being expressly forbidden to do so by the owner or occupant thereof shall be deemed guilty of trespass and upon conviction thereof shall be fined in any sum not to exceed Twenty-five (\$25.00) dollars.

The appellants argued below and appealed to this Court that their convictions under the statute violated the First and Fourteenth Amendment of the U.S. Constitution and Article II, Sec. 22 of the Oklahoma Constitution by abridging their right of access of freedom of the press. Mindful of the federal guarantee of the appellants' free press rights, it is unnecessary to address it to decide this case because I believe the appellants' criminal convictions, under the facts and circumstances of this case, violate the guarantee of freedom of the press as found in our state constitution.¹

¹ In pertinent part, that Article provides "No law shall be passed to restrain or abridge the liberty of speech or of the press." Okl. Const. Art. II, § 22.

This case arose when the Sunbelt Alliance, an anti-nuclear organization, planned a demonstration for June 2, 1979, to protest the construction of the Public Service Co. of Oklahoma's Black Fox Station Nuclear Power Plant, located in Rogers County, Oklahoma (hereinafter PSO). The Black Fox Station had been the scene of a prior protest in October of 1978.

Because PSO offices were dissatisfied with press coverage of the October, 1978, protest, they made provisions to handle press coverage of the June 2nd protest by designating that news media persons would be confined to a public viewing area located inside the proposed nuclear site. The Black Fox site covers 2,220 acres and the designated press area was located on a 2½ acre plot near the center of the site. Prior to designating this press site, neither PSO nor the appellants knew where the demonstrations would occur on the site.

On the morning of the demonstration, 339 demonstrators, in protest of building the proposed nuclear plant, crossed the perimeter fence and entered the property occupied by PSO. The nine appellant newsmen also crossed the fence and followed the demonstrators to observe and report the events that transpired. The newsmen violated PSO's rule that the press would be permitted only in the public viewing area. The demonstrators and the newsmen were met at the site by sheriffs in mobile booking vans who warned them to halt or be arrested. The appellants ignored the warning and were arrested for unlawful entry. The newsmen entered the site for the avowed purpose of covering the demonstration for the public. They did not demonstrate, nor interfere with PSO's construction activities, nor cause any harm to the nuclear plant. They also did not interfere with the policemen's booking and arrests of the protestors.

The major question on appeal is whether the State's criminal trespass statute can be used to punish news-

persons for peacefully entering upon quasi-public property during a political demonstration in order to bring newsworthy events occurring on that property to the public's attention. Central to this question is, if our criminal trespass statute can be so used, under what conditions may the State constitutionally exercise this power and were these conditions met under the circumstances of this case? Surprisingly, this precise issue has not been litigated. However, because of the importance of this issue and the inevitability of its reoccurrence, considering today's era of increasing political activities with interested groups conducting unauthorized demonstration on public and private property, I disagree with the manner in which my colleagues solve the constitutional questions presented as they relate to a free press. To resolve this case, I believe two questions must be answered: (1) whether the right of the press to go on quasi-public property to cover an ongoing political demonstration is in technical violation of our criminal trespass statute, and (2) whether enforcement of our criminal trespass statute against newsmen under the circumstances of this case is foreclosed by the free press clause of our State constitution.

I begin my analysis by acknowledging and adopting all of the trial court's findings of fact and conclusions of law. These are:

- (1) The property located at Black Fox Station is an enclosed field within the meaning of the Oklahoma Criminal Trespass Statute.
- (2) The actions of PSO at the Black Fox Station on June 2, 1979, to which the appellants herein objected, are considered State action for purposes of analysis under the First and Fourteenth Amendment of the U.S. Constitution and Article II, subsection 2, 7, and 22 of the Oklahoma Constitution.
- (3) The significant public controversy concerning whether a nuclear power plant should be built and

operated at Black Fox and the June 2, 1979, protest of construction of said facilities were newsworthy events.

- (4) Based on the orderly and peaceful conduct of newsmen at the October, 1978, political protest at Black Fox, PSO had no reason to believe newsmen would interfere with the demonstrators or do any harm to the Black Fox Station at the June 2 protest.
- (5) PSO had been unhappy with press coverage of the October, 1978, protest and wished to limit press coverage of the June 2, 1979, protest to those specific events which could be viewed from outside the perimeter fence and from the designated public viewing area inside the fence.
- (6) The purpose for limiting such press access was to prevent the protestors from "collecting publicity" based on PSO's belief that the demonstration did not deserve the kind of importance or legitimacy that debate and news coverage would give it. Accordingly, PSO sought to prevent newsmen from interviewing the demonstrators and from taking "close up" and "battle shots" of the marchers.
- (7) Prior to crossing the boundary fence, the appellants observed posted signs which warned them that entry without permission was under penalty of law. After crossing the fence, appellants failed to heed an official announcement that they were on private property and subject to arrest.
- (8) Only the appellant newsmen who crossed the perimeter fence with the demonstrators could observe the protestors' first encounter with the sheriff and the first arrest since these events could not be observed from outside the perimeter fence or from the designated public viewing area.

- (9) Some of the appellants and their employers published news stories about the June 2, 1979, demonstration, that included video and/or verbal description of, among other things, the protestors' initial encounter with the sheriffs and the arrests.
- (10) There were no unusual hazards to the appellants' safety on the Black Fox site on June 2, 1979.
- (11) The appellants did not interfere with any construction activity or cause any physical harm to the Black Fox Station on June 2, 1979.
- (12) The appellants did not interfere with the booking procedure or the sheriff's arrests of the protestors on June 2, 1979.
- (13) The appellants crossed the fenced boundary line at Black Fox Station solely to cover the protest as newsmen, not to demonstrate against nuclear power or PSO's plans to build a nuclear facility at Black Fox.
- (14) Based on decisions of the United States Supreme Court, lower Federal courts, and the Oklahoma Supreme Court, as a matter of law, there is a First Amendment right of the news media to reasonable access to the news such as is available to the public generally. The press, engaged in the process of gathering news and information for public distribution, may claim constitutional protection for its actions.

Based on this background of findings of fact and conclusions of law, my first inquiry is whether appellants were in technical violation of the criminal trespass statute. Our statute has not been construed in the context of reporters who passively enter quasi-public property in their newsgathering function and remain on the property after being requested to leave. However, our criminal trespass statute has been construed as it relates to

trespassing persons of the public generally. *Lambert v. Rainbolt*, 250 P.2d 459 (Okl. 1952); *Farmer v. State*, 508 P.2d 1114 (Okl. Cr. 1973); *Guindon v. State*, 627 P.2d 449 (Okl. Cr. 1981).

From these cases, it follows that the essential element of a criminal trespass offense is failure to halt or leave after being requested to do so by the owner or occupant. In the case at bar, the appellant newsmen failed to heed several warnings that their continued presence on the Black Fox site would result in their arrest. I must thus conclude their intrusion was unwarranted, constituted an illegal trespass and violated the statute.

Having decided that appellants violated the criminal trespass statute, my second inquiry is whether enforcement of the statute against newsmen, under the circumstances of this case, violated the free press clause of our State constitution. We have had many occasions to interpret our constitution's free press, free speech clause as against State statutes and city ordinances which sought to restrict these freedoms. In three of the first cases to come before this Court, we addressed the constitutionality of city ordinances that forbid pamphleteering on public streets. *Ex Parte Walrod*, 120 P.2d 783 (Okl. Cr. 1941); *Ex Parte Winnett*, 121 P.2d 312 (Okl. Cr. 1952); *Emch v. City of Guymon*, 127 P.2d 855 (Okl. Cr. 1942). In these cases we stated that: "'Freedom of the press' as guaranteed by constitutions, Federal and State . . . contemplates not only the right to print, but also the right to distribute. The power of municipalities to enact regulations in the interest of public safety, health and welfare or convenience, may not be so employed as to abridge the individual liberties secured by the constitution to those who wish to speak, write, print or circulate information or opinion."

This Court further interpreted our free speech, free press constitutional provision in *Lyles v. State*, 330 P.2d 734 (Okl. Cr. 1958), when we upheld a trial court's deci-

sion to permit television cameras in the courtroom during a criminal trial. In speaking of free press, free speech rights in that case, we stated:

This [right] belongs to every person. Under our constitution, the [right] may be freely used so long as it is not improperly exercised. No one can deny the long established right of the press in the United States to gather and disseminate news and information concerning every phase of human activity, together with the incidents pertaining thereto. This [right] makes the press the most potent servant of the people in protecting all rights against acts of tyranny, fraud, and corruption, as well as a most prolific medium of information and education. We are of the opinion that freedom of speech and press is not a discriminate right but the equal right of newsgathering and disseminating agencies, subject to the restrictions against abuse, and injurious use to individuals or public rights and welfare. *Id.* at 739.

In addition to these pertinent state court decisions cited, the United States Supreme Court has addressed the issue of right to press access to newsworthy events in light of significant cases. *Zemel v. Rush*, 381 U.S. 1, 85 S.Ct. 1271, 14 L.Ed.2d 179, reh'g denied, 382 U.S. 873, 86 S.Ct. 17, 15 L.Ed.2d 114 (1965); *Branzburg v. Hayes*, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972); *Pell v. Procunier*, 417 U.S. 817, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 94 S.Ct. 2811, 41 L.Ed.2d 514 (1974); *Oklahoma Publishing Co. v. District Court of Oklahoma County*, 430 U.S. 308, 97 S.Ct. 1045, 51 L.Ed.2d 355 (1977); *Houchin v. KQED, INC.*, 438 U.S. 1, 98 S.Ct. 2588, 57 L.Ed.2d 553 (1978); *Gannett Co., Inc. v. De Pasquale*, 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980).

While none of these federal cases are factually analogous to the instant case, in that none of them involved the State's use of a criminal trespass statute to deny press access, the cases are instructive in helping us decide the instant case because of the method the court used in reaching their decisions. To resolve the conflicting interests presented in each case, the court weighed the value of the asserted First Amendment rights against the objective of the government conduct that limited the right. The court recognized the value of a free press in a democratic society and reaffirmed the belief that press access to newsworthy events ensured the public would have a 'free marketplace of ideas where debate on public issues would be uninhibited, robust and wide open.' *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).

When I read in context all the press access cases decided by the United States Supreme Court, I find they hold that any press access claim to government information is subject to a degree of restraint dictated by the kind of forum, the nature of the information sought and the countervailing governmental interests. The claims are analyzed by balancing these three factors.

Our State court opinions have followed this same analysis. Although we are not bound by the United States Supreme Court decisions in interpreting the scope of our State Constitution free press clause, I find no tenable ground for not following the balancing guidelines laid down by the United States Supreme Court cases cited. Accordingly, I would hold that our State Constitution gives protection for the rights of the press to reasonable access to gather news and any restraint on this right, including but not limited to enforcement of a criminal trespass statute, requires that the State show a relatively greater consideration that must be exercised in

the public interest. A balancing of these opposing interests is thus mandated.

In determining the standard used to weigh the interests involved, Courts have considered the purpose and motive behind the abridging action. If, in a particular case, it is found that the purpose behind the State action is not legitimate, and is designed solely to penalize, control or limit speech or press rights, the State must show substantial justification for their actions before the restriction will be upheld. See *Grosjeon v. American Press Co.*, 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660 (1936); *Brown v. Louisiana*, 383 U.S. 131, 86 S.Ct. 719, 15 L.Ed. 2d 637 (1966); *Gomillion v. Lightfoot*, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960); *NAACP v. Alabama*, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958).

It is against this backdrop of constitutional principles and weighing standards that I now proceed to perform the 'delicate and difficult' task of weighing the circumstances and apprising the substantiality of the reasons advanced by the State in determining the press' right of access under the circumstances of this case.

I begin by addressing appellant's argument that the open fields at the proposed nuclear site was considered a traditional First Amendment forum and subject only to reasonable time, place and manner restrictions. I do not agree. Traditional public forums as parks, streets and sidewalks are exclusively publicly owned and supported. Black Fox Station was not imbued with this type of public character. PSO, as majority owner of the station, was a private corporation with a substantial financial investment in the project. The government subsidies infused in the program were more in the nature of promotional incentives than proprietary acts denoting incidents of public ownership. I am bound to find, however, that Black Fox's open fields had a quasi-public character and conclude, as did the trial court, that PSO's actions there would be held to be State action for purposes of First

Amendment analysis. We find State action exists not only because the station received extensive government subsidies but also because it had monopoly status, was heavily regulated by the State, and the minority owners were instrumentalities of the United States.

Having decided that Black Fox's open fields do not qualify for the stringent weighing standards of time, place, and manner regulations, I turn then to the other weighing standard which is based on the historical and practical justifications each side presents to support their position. In using this balancing test, the total circumstances must be considered.

On the press's side of the scale is the media's news-gathering right to reasonable access to newsworthy events. This right is constitutionally protected. It is premised on the significance of a free press for the maintenance of our political system. See *Richmond*, *Gannett*, *Saxbe*, *Branzburg*, and *Houchin*, *supra*. It is an uncontroverted fact that the news media is an integral part of our national communication system by which the public obtains information to form their judgments about national politics. The press has a constitutionally recognized role to inform and educate, offer criticism and provide a forum for public discussion and debate.

In assessing a First Amendment press access claim, we use the qualifying test of looking at historical practice, the specific structural value of the claim in the circumstances and the kind of information the press seeks as against the State interests invaded. *New York Times Co. v. Sullivan*, *supra*, at U.S. 270; *Richmond* *supra*, at 2842 (Marshall, J. and Brennan, J. concurring.) In assessing the press access claim in this case, I make three important observations: First, the nuclear power demonstration at Black Fox was a newsworthy event and media coverage of it was at the very core of the protection afforded by the First Amendment. Second, press access to this newsworthy event was not reasonable because the

press was designated a specific area to be on the site before the demonstration began when it could not have been known where the demonstration would take place. This kind of prior restraint has been deemed to be presumptively invalid. And third, the information the press sought was about the operation of the government and this type of information the public had a deserved right to know.²

On the State's side of the scale, they justify enforcing the criminal trespass statute against newsmen for two reasons: (1) to maintain order and (2) to protect property interests. The State urges us to recognize the public utility of their actions as a valid exercise of their police powers. That the State, under the police powers, may maintain order and protect property interests, is not denied as a general statement. But in accomplishing these objectives, do the State's police powers extend so far as to restrict or totally subvert press access to a newsworthy event? The determination of that question begins with the observation that the usual presumption favoring statutory validity is not operative against restrictions of pre-eminent freedom secured by our State Constitution and the First Amendment of the U.S. Constitution. These liberties are given a priority that does not permit dubious intrusion. Accordingly, any attempt to restrict them must be justified by a clear public interest that is presently threatened by the activity sought to be regulated.

The State claims the threatened public interest in this case was that of public safety. It argues that the demonstrators' mass act of civil disobedience presented the possibility of a hostile and violent confrontation with unknown consequences. This justification may have been a

² *Richmond*, supra, at 2842 (Blackmun, J., concurring)

The public has an intense need and a deserved right to know about the administration of justice in general . . . about the conduct of other public servants, and all actors in the judicial arena.

proper consideration for the 300 demonstrators that threatened the public peace with their unauthorized march. But this justification could scarcely be applicable to the nine newsmen who came and left peacefully with the demonstrators and were not involved in anything other than the gathering of the news. The political demonstration at Black Fox was not classified as a 'scene of a crime or other disaster' that understandably would warrant exclusion of the press for safety or security reasons. The record does not support the contention that the newsmen's physical safety was endangered. Quite the contrary, the trial court specifically found that there were no dangers to anyone on the site and the demonstration was peaceful and orderly. It could be argued that the presence of the press, by assuring full public accountability, diminished the possibility of a violence confrontation and very possibly assured that everything remained peaceful. Moreover, the United States Supreme Court has held that "mere speculation of harm does not constitute a compelling State interest." *Consolidated Edison Co. of New York v. Public Service Co.*, 447 U.S. 530, 542, 100 S.Ct. 2326, 2336, 65 L.Ed.2d 319 (1980).

I next address the State's argument that the press was not denied reasonable access because, in their assessment, the events that transpired prior to the demonstrators' arrest had no special newsworthy significance. The State's conclusion on this issue is constitutionally impermissible. No court or government official can make the determination of what is a significant newsworthy event. Chief Justice Burger, writing in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258, 94 S.Ct. 2331, 41 L.Ed.2d 730, stated:

The choice of material to go into a newspaper and the decision made as to . . . content and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It is yet to be demonstrated how gov-

ernmental regulation of this crucial process can be exercised with First Amendment guarantees of a free press as they have evolved to this time.

See also *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 124-125, 93 S.Ct. 2080, 36 L.Ed.2d 772, (1973) where the court held that editors, newspapers, and broadcasters have the power to select and choose news material. I am of the opinion that the people themselves are the final masters of what news they consume since they have the most effective tools to make that choice through selective reading, listening and T.V. viewing. Government officials do not have the function of news censoring in a republic society even if there were no First Amendment. I sanction James Madison's view that "censorial power is in the people over the government, and not in the government over the people." 4 Annals of Congress 934 (1774).

I next consider the State's justification for their action as that of protecting PSO's property rights. Protecting property in an orderly society is of the highest importance. But in this case, the trial court's finding of fact did not support the view that PSO's property interests were imperiled by the newsmen. The trial court found that PSO had no reason to believe and they did not believe that the newsmen at the June 2 demonstration would do any harm to the site or damage any of their facilities. PSO was secure in this belief based on the press's orderly and peaceful actions at the political demonstration held on the site in October, 1978. Based on those uncontroverted facts, I do not find the State's justifying reason of protecting property interests a persuasive argument. It is also not supported by the trial court's own findings of fact.

I do not intimate that a private person may not be secure in his property rights on his private property. But the property interest sought to be protected here had a quasi-public character. Property interests on quasi-public

property are not absolute. These interests must be exercised for the convenience of all and must not, in the guise of regulation, totally abridge free speech and free press rights. *Hague v. Cio*, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423 (1939).

And finally, I address the motive and purpose behind the State's abridging action. The trial court specifically found that PSO's reasons for limiting press coverage was for the illegitimate purpose of controlling the kind of news story the press would later distribute to the public. The trial court commendably decided that such action was objectionable, ignorable, and incompatible with the rights of a free people. But after correctly making this assessment, the trial court regrettably failed to place the proper weight on this objectionable action. The United States Supreme Court has consistently held that no regulation, even under time, place and manner restrictions, can be based on the content of the expression. It is well settled that the government cannot prohibit communication merely because they disapprove of the speaker's views. *Niemotko v. Maryland*, 340 U.S. 268, 71 S.Ct. 325, 95 L.Ed. 267 (1951); *Carey v. Brown*, 447 U.S. 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980); *Garrett v. Estelle*, 424 F. Supp.468 (N.D. Tex.1977); *McHealthy City Board of Education v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed. 2d 471 (1977); *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct 1731, 20 L.Ed2d 811 (1968); *Epperson v. Arkansas*, 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed2d 228 (1968); *Grosjean v. American Press Co.*, *supra*, (1936).

In the instant case, the trial court did not give PSO's improper motives the critical scrutiny demanded under our state constitutional free press clause or under accepted first amendment principles. Given PSO's deliberate attempt to limit press access based on their disapproval of the message the media would convey to the public and PSO's use of the criminal trespass statute to accomplish their goal, I would hold the State has not presented a legit-

imate interest for their inhibiting actions. I would not permit our criminal trespass statute to be used illegitimately and in this manner in order to prevent the public from knowing what their government is doing on quasi-public property. It is inconceivable to me that a contrary conclusion could be sanctioned in our democratic society.

I do not say that the press has an absolute right to go on public property to gather news. I would only hold that our criminal trespass statute cannot be used abitrarily and unreasonably to exclude the press from their constitutionally protected news gathering role on public property when the State does not present a legitimate or important countervailing interest. The press remains subject to reasonable time, place and manner restrictions when exercising its news gathering role in traditional First Amendment forums and subject to the weighing tests discussed herein when making a press access claim to non-traditional public forums. I would reaffirm the holding in *Central Liquor Co. v. Oklahoma Alcoholic Beverage and Control Board*, 640 P.2d 1351 (Okl.1980), where the State Supreme Court stated: "Police power must be exercised in the public interest with scrupulous concern for private rights guaranteed by the Constitution. It may not be utilized for the benefit of a private company." I agree that the power of the State must be protected but it must not be abused.

I have thoroughly considered the justifications given by the State for their inhibiting actions and conclude that these justifications are not outweighed by the press's claim of reasonable access to the newsworthy event in this circumstance. I would also find that the State's justifications are not supported by the trial court's findings of fact. I would further find that the State's denial of press access in this case was for the illegitimate purpose of controlling the news and thus no legitimate state interest was being served.

In sum, I believe that the restrictions on the press by enforcing the criminal trespass statute against the newsmen under the circumstances of this case was destructive of the right of a free press to gather news when the State did not have a greater, substantial or legitimate interest to be served. I would hold that this State action is incompatible with the free press freedoms as secured by Article II, Section 22 of our State Constitution. Accordingly, I believe the prosecutions of the appellant newsmen were unjustified and the judgment of the trial court should be Reversed. Therefore, I dissent to this decision.

APPENDIX B

IN THE DISTRICT COURT
IN AND FOR ROGERS COUNTY
STATE OF OKLAHOMA

Nos. CRM-79-373; 79-407; 79-512; 79-540; 79-547;
79-561; 79-635; 79-681; 79-437;
(Cases consolidated for trial)

STATE OF OKLAHOMA,

—vs—

*Plaintiff,*BENJAMIN BERNSTEIN, *et al.*,*Defendants.*

The trial in this matter was held on November 20, 21, 28, 29, and 30, 1979. The Defendants, Ben Bernstein, William A. Collard, Mark Raymond Emerson, Michael D. Kelley, David P. McDaniel, Eli W. Nixon, and Ronald Earl Stahl, are charged with violation of 21 Oklahoma Statutes Subsection 1835. Defendants William A. Collard and Ronald Earl Stahl appeared personally and were represented by their attorneys of record, Gable, Gotwals, Rubin, Fox, Johnson & Baker, by John Henry Rule; Defendant Ben Bernstein was represented by, and Defendants Mark Raymond Emerson, David P. McDaniel and Eli W. Nixon appeared personally and were represented by their attorney of record, Dennis R. Neil of the American Civil Liberties Union of Oklahoma. Defendant Steven Wolfson was represented by, and the Defendant Vicki Jean Monks appeared personally and was represented by Louis Bullock and Robert Hager, attorney of record. The Defendant Michael D. Kelley appeared personally and was represented by Louis Bullock and Dennis Neil, attorney of record.

The matters which must first be dealt with by the Court are the motions to dismiss filed on behalf of the Defendants which seek a dismissal of this prosecution on Constitutional grounds. Ordinarily, these motions would have been argued, considered, and ruled upon prior to trial of the case. The motions were presented to the Court prior to trial, testimony and other evidence was received, and they were argued. By the agreement and request of the parties the motions were taken under advisement by the Court until conclusion of the trial on the merits in order that the evidence presented at trial might be considered, as applicable, in regard to the ruling upon the motions to dismiss.

The motions to dismiss have alleged basically that there exists such a close nexus between PSO and government in this case that the Court must find that the actions of PSO on June 2, 1979 amount to state action within the framework of Constitutional doctrines, and therefore the Constitutional freedoms guaranteed by the Constitution may be asserted in this case. The question of state action amounts to a determination by the Court of whether PSO activities on June 2, 1979 were strictly private actions or whether there exists such a close nexus between PSO and government that the action of PSO is for purposes of Constitutional rights the action of the State. The answer to the question is determined by an analysis of the extent of State and Federal involvement in the otherwise private action.

In the event that state action is found, the Defendants rely upon the First Amendment of the United States Constitution which provides a right of freedom of the press and freedom of speech. The First Amendment has justifiably been characterized as providing the most important of all Constitutional rights, and as one of the cornerstones of freedom and a free society. The matter of freedom of speech and critical expression has been dealt with in detail by appellate courts. However, the full scope of the

protection afforded to the press under the First Amendment has been less distinctly defined.

The Defendants specifically allege denial of a Constitutional right of limited access to the Black Fox Station on June 2, 1979, to cover the arrest of nuclear power protestors allegedly trespassing upon PSO property, a bona fide news story relative to the national controversy over the use of nuclear energy for the generation of electrical power. Defendants further allege that unlawful discrimination among news persons exercising these rights occurred in violation of the Equal Protection clause of the Federal and Oklahoma Constitutions.

The evidence has been extensive. Expert testimony has explored the multitude of relationships between government and the nuclear industry and utility companies, and over sixty (60) exhibits have been admitted into evidence. Extensive briefs have been filed by and on behalf of the Defendants, both by private counsel and the American Civil Liberties Union and by the Harvard Civil Rights—Civil Liberties Committee as Amicus Curiae. A considerable effort has been made by the parties to identify these issues and present them to the Court. This effort appears to have been made not because of the sanctions which may be imposed for violation of the trespassing statute the Defendants are accused of violating, but because of the importance of the Constitutional issues that are involved to a free people and a free press.

After consideration of the evidence presented, the Court makes and adopts these findings of fact and conclusions of law:

1.1 Public Service Company of Oklahoma (hereinafter called "PSO") was at all times relevant to this action the owner of certain real property located in Rogers County, Oklahoma, known as "Black Fox Station."

1.2 PSO acquired a portion of Black Fox Station by eminent domain, pursuant to power conferred upon it by 27 Oklahoma Statutes Subsection 7 (1971). Defendants'

Exhibit 18. Black Fox Station is dedicated to a public use, i.e., generation of electric power.

1.3 PSO, Associated Electric Cooperative, Inc. (hereinafter called "Western") have applied to the United States Nuclear Regulatory Commission (hereinafter called "NRC") for construction permits, operating licenses for the construction and operation of two nuclear power reactors at the Black Fox Station in Rogers County, Oklahoma. See Exhibit 1 to Affidavit of Rebecca L. Rowe, Defendants' Exhibit 20: Testimony of Vaughn L. Conrad, PSO's Manager of Licensing and Compliance.¹

1.4 PSO's, Associated's and Western's aforementioned Application to NRC sets forth the following facts relevant to this action:

a. PSO shall act as project manager of the Black Fox Station Nuclear Plant.

b. PSO, Associated and Western shall own the Black Fox Station site, Units One and Two, and common station facilities as tenants in common as follows:

i. PSO shall own an undivided 60.87% interest;

ii. Associated shall own an undivided 21.739% interest; and

iii. Western shall own an undivided 17.391% interest.

c. PSO is a corporation duly incorporated and existing under the laws of the State of Oklahoma.

d. Associated is an electric cooperative incorporated in the State of Missouri and organized under the Rural Electrification Act.

¹ Attached hereto as Exhibit A and Exhibit B are, respectively, lists of the witnesses who testified and the exhibits that were introduced at trial.

e. Western is an electric cooperative incorporated in the State of Oklahoma under the Rural Electric Cooperative Act.

f. The Black Fox Station site, consisting of approximately 2,206 acres, is located approximately 23 miles east of Tulsa, Oklahoma, on the east side of the Verdigris River in Rogers County, Oklahoma.

g. PSO, Associated and Western will pay the entire cost of Black Fox Station in proportion to the percent interest therein of each of them, as noted above. Funds will be available from normal and regular sources for construction of additions to each owner's property. Funds for PSO include (1) funds on hand; (2) funds available from internal sources, primarily retained earnings and provisions for depreciation; (3) short-term loans; and (4) the sale of securities as required. Associated's and Western's sources of funds will be primarily through the United States Department of Agriculture Rural Electrification Administration guaranteed loan program. A portion of the short-term front-money may be supplied by the National Rural Utilities Cooperative Finance Corporation. After the construction permit is issued by NRC, 100% of Associated's and Western's portion of the project will be financed through the Rural Electrification Administration guaranteed loan program. PSO estimates that 45% to 55% of its portion of the project cost will be financed from the sale of securities. Bonds issued on behalf of Associated and Western will be marketed by the United States of America through the Federal Financing Bank and will be guaranteed by the United States of America. The total cost of the two-unit station was estimated, as of December 8, 1977, to be \$1,750,000,-000.00.

h. PSO is subject to the jurisdiction of the Federal Power Commission in regard to certain electric utility facilities and operations, and is under the gen-

eral supervision of the State of Oklahoma Corporation Commission in respect of rates, accounts, issuance of securities, valuation of properties and in certain other respects, as provided by Oklahoma law. PSO is also subject to limited regulation by the United States Securities and Exchange Commission since it is a subsidiary of a registered holding company (all of the common stock of PSO is owned by Central and South West Corporation).

1.5 Under the circumstances, the relationship between PSO and Associated and Western and the United States of America and other levels of government with respect to the acquisition, construction, operation and ultimate "decommissioning" of Black Fox Station and the nuclear power electric generating facilities at Black Fox Station is such that all of PSO's acts in connection therewith are acts of government:

a. The United States of America, by and through the Department of Agriculture Rural Electrification Administration loan guarantees to Associated and Western, is materially aiding the financing of Black Fox Station, and must approve the agreement among PSO, Associated and Western that governs their relationship with respect to all phases of Black Fox Station:

i. The Rural Electrification Administration has committed to guarantee loans to Associated and Western in the amounts of \$1,408,315,000.00 and \$860,583,000.00 respectively, for, among other purposes, Associated's and Western's interests in Black Fox Station. See letters from United States Department of Agriculture to Associated and Western, part of Defendants' Exhibit 4.

ii. The Black Fox Nuclear Electric Generating Station Ownership Agreement among PSO, Associated and Western becomes effective upon its approval by the Administrator of the Rural

Electrification Administration, an agency of the United States Department of Agriculture. See Section 24.1 of the Agreement, part of Defendants' Exhibit 4; Testimony of Vaughn L. Conrad.

b. In consideration for the aforementioned guarantee and other considerations, Associated has mortgaged to the United States of America that portion of Black Fox Station acquired by PSO by the eminent domain proceedings referred to in Paragraph 1.2 hereof. Defendants' Exhibit 21, Paragraph 1 (p); Defendants' Exhibit 19.

c. PSO, Associated and Western cannot construct or operate nuclear electric power generating facilities at Black Fox Station without prior approval of the NRC:

i. Pursuant to an Amended Notice of Hearing published by NRC on October 26, 1978 (41 Fed. Reg. 56918), the NRC Atomic Safety and Licensing Board (see 10 C.F.R. Subsection 1.11 (1979) has conducted extensive hearings concerning environmental and site suitability issues and radiological health and safety issues in connection with the aforementioned Application to NRC by PSO, Associated and Western. Testimony of Vaughn L. Conrad.

ii. On July 24, 1978, the NRC Atomic Safety and Licensing Board issued a "Partial Initial Decision Authorizing Limited Work Authorization." 8 N.R.C. 102 (1978). Pursuant to said "Partial Initial Decision," the Director of Nuclear Reactor Regulation of the NRC issued a Limited Work Authorization to PSO on July 26, 1978, authorizing site clearance and excavation and certain other non-safety-related work at Black Fox Station. Defendants' Exhibit 5B; Testimony of Vaughn L. Conrad.

iii. Prior to the issuance of the Limited Work Authorization by NRC, PSO was prohibited from conducting even minimal construction activities at Black Fox Station, including any clearing of land, excavation or other substantial action that would adversely affect the environment of Black Fox Station. Testimony of Vaughn L. Conrad; 10 C.F.R. Subsection 50.10 (1978).

iv. The Limited Work Authorization issued to PSO by NRC on July 26, 1978 was subsequently amended on September 6, 1978, November 30, 1978, and July 24, 1979. Defendants' Exhibits 5C, 5E and 5G. However, all PSO construction activities continue to be subject to strict supervision and prior authorization by NRC, and must be terminated in the event construction permits are denied by NRC's Director of Nuclear Reactor Regulation. Testimony of Vaughn L. Conrad; Defendants' Exhibit 5G. Still pending before NRC's Atomic Safety and Licensing Board for Resolution are some of the radiological health and safety issues and the Board's decision on the issuance of construction permits for Black Fox Station, on which the Board has deferred ruling in light of the Three-Mile Island incident. Order of NRC Atomic Safety and Licensing Board dated June 13, 1979, in Docket Nos. STN 50-556 CP and STN 50-557 CP, Exhibit 10 to Affidavit of Rebecca L. Rowe, Defendants' Exhibit 20.

d. PSO was required to and has obtained or will obtain from various agencies of government other licenses and permits in connection with its plans to build and operate nuclear electric power generating facilities at Black Fox Station, as follows (Testimony of Vaughn L. Conrad):

i. Construction/demolition permits from the Oklahoma State Department of Health (see Defendants' Exhibits 6A, 6B, 6C, 6D, and 6E) ;

ii. Permit from the United States Environmental Protection Agency to discharge waste water from Black Fox Station (see Defendants' Exhibits 7A, 7B, 7D, and 7E) ;

iii. Permit from the Oklahoma Water Resources Board to dispose of waste (see Defendants' Exhibits 8E, 8F, 8F(A), 8G and 8H) ;

iv. Permits from the Oklahoma Water Resources Board to construct a dam and reservoir to be used as a pre-settling pond (see Defendants' Exhibits 8A, 8B, 8C and 8D) ;

v. Permit from the Oklahoma Water Resources Board to appropriate stream water from the Verdigris River (see Defendants' Exhibit 8J) ;

vi. Permits from the Oklahoma State Department of Health to construct air emission facilities (see Defendants' Exhibits 9A, 9B and 9C) ;

vii. Permit from the Oklahoma State Department of Health to install a sewage treatment facility (see Defendants' Exhibits 10A, 10B and 10C) ;

viii. Permits from the United States Army Corps of Engineers to construct certain facilities on the Verdigris River (see Defendants' Exhibits 11A, 11B, 11C, 11D, 11E, 11F and 11G) ;

ix. Easements from the United States Department of the Army (see Defendants' Exhibits 12A, 12B, 12C, 12D, 12E and 12F) ;

x. Permits from the State of Oklahoma Corporation Commission to construct and operate railroad spur tracks (see Defendants' Exhibits 13A and 13B) ;

xi. Permits from the Board of County Commissioners of Rogers County, to close certain section line roads (see Defendants' Exhibit 14A) and to use a certain public right-of-way and to connect a road with existing county road (see Defendants' Exhibit 14B);

xii. Permit from the United States Department of Transportation Federal Aviation Administration to construct and operate a 350 foot meteorological/microwave tower (see Defendants' Exhibits 15A and 15B) required to be able to submit certain meteorological information to NRC (Testimony of Vaughn L. Conrad); and

xiii. Permits from the United States Army Corps of Engineers to construct railroad bridges over two creeks in Rogers County, Oklahoma (see Defendants' Exhibits 7C and 16).

e. PSO was required by law to make available to other power entities the opportunity to participate in the construction and operation of the nuclear electric power generating facilities at Black Fox Station, and Associated and Western are co-venturers in Black Fox Station by virtue of said requirement. Testimony of Vaughn L. Conrad. As entities organized under the Rural Electrification Act and Rural Electric Cooperative Act, respectively, and by virtue of the federally guaranteed financing those entities will use to participate in Black Fox Station, pursuant to the federal Rural Electrification Act, 7 U.S.C. Subsection 901 et seq., Associated and Western are instrumentalities and agencies of the federal government for purposes of their acts in connection with Black Fox Station. Under the Black Fox Nuclear Electric Generating Station Ownership Agreement (part of Defendants' Exhibit 4) and the Black Fox Nuclear Electric Generating Station Memorandum of Agreement (Defendants' Exhibit 4) and the Black Fox Nuclear Electric Generating Station Memorandum

dum of Agreement (Defendants' Exhibit 34), all of PSO's acts in connection with Black Fox Station are in its own behalf and in behalf of Associated and Western, and are therefore acts of instrumentalities and agencies of the federal government.

f. Prior to 1954, the United States Atomic Energy Commission (hereinafter called "AEC"), predecessor of the NRC, owned all nuclear facilities and the special nuclear material produced by or used in them. Atomic Energy Act of 1945, Pub. L. No. 79-585, 60 Stat. 755. Technology developed by the United States government both prior to 1954 and since 1954 has been made available to the nuclear power industry generally, and has benefitted PSO either directly or indirectly in a substantial manner in connection with its plans to construct and operate nuclear electric power generating facilities at Black Fox Station. Testimony of Dr. Amory Lovins; Defendants' Exhibit 2.

g. Without governmental aid with respect to insuring against hazards of nuclear accidents, the nuclear power industry would not have developed. Testimony of Dr. Amory Lovins; Hearings before the Joint Committee on Atomic Energy on Government Indemnity for Private Licenses and AEC Contractors Against Reactor Hazards, 84th Cong., 2nd Sess., 9, 109, 110, 115, 120, 136, 137, 148, 181, 195 and 240 (1956), cited in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 49, 98 S.Ct. 2620 (1978). Congress therefore passed the Price-Anderson Act, Act of September 2, 1957, Pub. L. No. 85-256, 71 Stat. 576, which had the dual purpose of "protect(ing) the public . . . and . . . encourag(ing) the development of the atomic energy industry," 42 U.S.C. Subsection 201(i) (1970). PSO must and will comply with the provisions of the Price-Anderson Act in connection with its ownership and operation of Black Fox Station. Testimony of Vaughn L. Con-

rad. Under the current Act, there is a \$560,000,000.00 limitation on liability for damages caused by a nuclear accident, to be borne as follows, in the event of a nuclear accident causing damages of \$560,000,000.00 or more:

- i. \$315,000,000.00 from contributions of \$5,000,000.00 to be made by owners of reactors, pursuant to 42 U.S.C. Subsection 2210(b);
- ii. \$140,000,000.00 from private insurance; and
- iii. \$105,000,000.00 by the federal government.

See Duke Power Company v. Carolina Environmental Study Group, Inc., supra, 438, U.S. at 59, 98 S. Ct. at 2626-27. The effect of the Price-Anderson Act is a subsidy by the federal government to the nuclear power industry in general and to PSO, Associated and Western in connection with Black Fox Station. Whereas a member of the nuclear power industry normally would be expected to answer for all damages in connection with a nuclear power accident for which it is found responsible, the Act not only limits liability and thus reduces the disincentive to the development of nuclear electric power generating facilities, but also contains a promise by the federal government to underwrite a part of the losses which might result from such an accident. Furthermore, in the event a nuclear accident causes damages in excess of \$560,000,000.000, the Congress "will thoroughly review the particular incident and will take whatever action is deemed necessary and appropriate to protect the public from the consequences of a disaster of such magnitude." 42 U.S.C. Subsection 2210(e).

h. The United States Department of Energy is the sole entity providing "enrichment" of nuclear fuels necessary prior to their use in nuclear electric

power generators. Testimony of Vaughn L. Conrad. PSO has entered into a long-term contract with the Department of Energy for the enrichment of fuel for Black Fox Station. Defendants' Exhibit 17.

i. All phases of PSO's construction and operation of the nuclear electric power generating facilities at Black Fox Station are and will be subject to intense and continual supervision and inspection by the NRC. *See generally* 10 C.F.R. Chapter 1.

j. The fuel that will be used by Black Fox Station's nuclear electric power generating facilities, if they are built and operated, will become highly radioactive and will require safe storage for many years at great expense. Testimony of Dr. Amory Lovins. PSO does not plan to construct facilities for the long-term storage of all such spent fuel; rather, PSO is relying upon the federal government to continue its current policy to accept such spent fuels and store them. Testimony of Vaughn L. Conrad. The government's policy of storing said waste in the face of unquantifiable total costs for doing so amounts to a subsidy to the nuclear power industry in general and will be a subsidy to PSO, Associated and Western in the event nuclear electric power generating facilities are built and operated at Black Fox Station. Furthermore, because PSO intends to recover its costs of Black Fox Station by inclusion thereof in its rate base pursuant to permission it will seek from the State of Oklahoma Corporation Commission (Testimony of Vaughn L. Conrad), even if the federal government levies a charge for storage of spent fuels, there is a significant probability that the public, not PSO, will bear the ultimate expense of storing said spent fuels.

k. At the end of the useful life of Black Fox Station's nuclear electric power generating facilities, if they are built and operated, said facilities must be "decommissioned." Testimony of Vaughn L. Conrad

and Dr. Amory Lovins. Estimates of the total cost of "decommissioning" vary greatly: Dr. Lovins testified that the estimates range as high as the total cost for construction of a nuclear electric power generating plant, while Vaughn L. Conrad testified that the costs may be estimated at two to three percent of the cost of construction of the plant. Currently, NRC has not set policies for "decommissioning" (Testimony of Vaughn L. Conrad and Dr. Amory Lovins), and it is not possible to estimate a precise cost for "decommissioning" of Black Fox Station if it is built and operated. However, there is a substantial probability that the total cost of "decommissioning" will exceed PSO's estimates, in which event PSO may be expected to rely upon governmental aid, either direct or indirect, to pay such cost. Testimony of Vaughn L. Conrad and Dr. Amory Lovins. In any event, PSO expects to recover said cost and all other costs of Black Fox Station by inclusion thereof in its rate base, pursuant to permission it will seek from the State of Oklahoma Corporation Commission. Testimony of Vaughn L. Conrad. There is a reasonable probability that the costs of Black Fox Station will be borne by the public, further indicating that Black Fox Station is not a truly private venture.

1.6 There has been and is significant public controversy concerning whether or not PSO, Associated and Western should be permitted to build and operate nuclear electric power generating facilities at Black Fox Station:

a. The NRC has conducted extensive hearings concerning, among other things, the suitability of the site for nuclear electric power generation. Testimony of Vaughn L. Conrad.

b. On October 7, 1978, there was a protest of construction of nuclear electric power generating facilities at Black Fox Station, in which protestors crossed the fenced boundry lines of Black Fox Station and were subsequently arrested and tried for violation of

21 Okla. Stat. Subsection 1835 (1971). The charges were dismissed by the Rogers County, Oklahoma District Court. Defendants' Exhibit 22; Testimony of Harvey E. Sollars.

1.7 On June 2, 1979, there occurred a second protest of construction of nuclear electric power generating facilities at Black Fox Station, in which 339 protestors crossed the fenced boundry lines of Black Fox Station (Tab U, Defendants' Exhibit 27) and were subsequently arrested by Rogers County, Oklahoma Sheriff Amos Ward and tried for violation of 21 Oklahoma Stat. Subsection 1835 (1971). The protestors' cases were tried to a jury and resulted in a hung jury. The Rogers County, Oklahoma District Court declared a mistrial and subsequently dismissed the charges without prejudice to the refileing thereof. Defendants' Exhibit 23.

1.8 The significant controversy concerning whether or not PSO, Associated and Western should be permitted to build and operated nuclear electric power generating facilities at Black Fox Station and the October 1978 and June 1979 protests of construction of said facilities were and are newsworthy events.

1.9 Prior to the October 1978 protest, PSO issued press passes to newsmen who desired to cover that event. Testimony of Peter M. Crow, Mark Raymond Emerson, Eli W. Nixon and Harvey E. Sollars; Defendants' Exhibit 26. Over 50 newsmen crossed the fenced boundary line of Black Fox Station with the protestors during the October 1978 protest. Testimony of Peter M. Cros, Mark Raymond Emerson and Eli W. Nixon; *see* Defendants' Exhibit 37, 43 and 44. None of those newsmen were arrested. Testimony of Mark Raymond Emerson and Eli W. Nixon. Those newsmen did not significantly interfere with the Sheriff's arrest of the protestors or with construction activity at Black Fox Station and did not cause any damage to Black Fox Station. Testimony of Harvey E. Sollars. Those newsmen were with the October 1978 protestors when the protestors were first

warned that they were trespassing and subject to arrest, when the protestors first encountered the Sheriff, and when the protestors were arrested. Testimony of Mark Raymond Emerson and Eli W. Nixon.

1.10 PSO learned in advance of the planned June 2, 1979 protest of the construction of nuclear electric power generating facilities at Black Fox Station. Testimony of Harvey E. Sollars and Richard B. Risk, Jr., PSO's Manager of Nuclear Information; Defendants' Exhibit 27.

1.11 PSO had reason to believe prior to the June 2 protest that the protestors intended to physically interfere with construction of nuclear electric power generating facilities at Black Fox Station. *See* Defendants' Exhibits 26 and 27; Testimony of Harvey E. Sollars. PSO had no reason to believe prior to the June 2 protest that defendants or other newsmen intended to or would physically interfere with construction of nuclear electric power generating facilities at Black Fox Station or do any harm to Black Fox Station.

1.12 A PSO committee was established to engage in extensive planning for the June 2 protest. Testimony of Harvey E. Sollars and Vaughn L. Conrad; Defendants' Exhibit 27. The committee was composed of Chairman G. W. Muench, L. W. Paden, H. E. Sollars, R. B. Risk and V. L. Conrad. *See* PSO intracompany correspondence from T. M. Ewing dated March 22, 1979, part of Defendants' Exhibit 27.

1.13 PSO's planning for the June 2 protest included several meetings between Harvey E. Sollars, PSO's Security Coordinator for Black Fox Station, and Sheriff Ward and Deputy Sheriff Fritz Freeman of Rogers County, Oklahoma. Testimony of Harvey E. Sollars; Defendants' Exhibit 27. PSO and the Sheriff discussed the manner of handling the protestors, i.e., whether the protestors should be physically arrested or issued citations. For publicity and other reasons, (*see* PSO intra-company correspondence from Dick Risk dated April 16, 1979, part

of Defendants' Exhibit 27), PSO preferred and recommended the citation method, which was used by the Sheriff on June 2. Testimony of Harvey E. Sollars; Defendants' Exhibit 27.

1.14 PSO prepared a detailed Occupation Plan for the June 2 protest, which included the options for handling the protestors and certain announcements to be made by the Sheriff. *See* Tab R of Defendants' Exhibit 27. PSO gave a copy of the Occupation Plan to the Sheriff. Testimony of Harvey E. Sollars.

1.15 PSO's committee for planning PSO's handling of the June 2 protest was requested to develop a plan for media coverage of the protest. *See* PSO intra-company correspondence from T. M. Ewing dated March 22, 1979, part of Defendants' Exhibit 27. Richard B. Risk, Jr., PSO's Manager of Nuclear Information prepared the Public Relations Annex to the Black Fox Station Site Occupation Plan for June 2, 1979. Testimony of Richard B. Risk, Jr.

1.16 PSO had been unhappy with the press coverage of the October 1978 protest and wished to limit press coverage of the June protest. Testimony of Harvey E. Sollars and Richard B. Risk, Jr. Specifically, PSO planned and intended to limit press coverage of the June 2 protest to those events which could be viewed from outside the perimeter fence of Black Fox Station and from a designated "public viewing area" inside the perimeter fence of Black Fox Station (Point F on Plaintiff's Exhibit 2). Testimony of Richard B. Risk, Jr. The purposes for such limitation included preventing the protestors from "collecting publicity," based on PSO's belief that the demonstration did not "deserve the kind of importance or legitimacy that debate and news coverage would give it" (*See* PSO intra-company correspondence from V. L. Conrad dated March 28, 1979, part of Defendants' Exhibit 27), and preventing media participation in the trespass march and "close-up shots, interviews and battle shouts

by the marchers." See PSO intra-company correspondence from Dick Risk dated April 16, 1979, part of Defendants' Exhibit 27.

1.17 PSO intended to limit public and press first-hand observation of all events that occurred during the June protest from the time the protestors crossed the perimeter fence until such time, if any, the protestors neared the public viewing area inside the perimeter fence.

1.18 PSO did not know prior to the June 2 protest where the protestors would enter Black Fox Station, where the protestors' initial encounter with the Sheriff would occur, or where the arrests of the protestors would occur. Testimony of Harvey E. Sollars and Richard B. Risk, Jr.

1.19 PSO did not know prior to the June 2 protest whether or not the public and press would be able to see the protestors' initial encounter with the Sheriff or the arrests of the protestors from outside the perimeter fence or from the designated public viewing area within the perimeter fence.

1.20 PSO invited the Sheriff of Rogers County, Oklahoma, onto Black Fox Station in advance of the June 2 protest for the express purpose of having the Sheriff arrest the protestors. Testimony of Harvey E. Sollars. The Sheriff and Deputy Sheriff arrived at Black Fox Station on June 2 prior to the time the protestors crossed the perimeter fence. Testimony of Sheriff Amos Ward, Deputy Sheriff Fritz Freeman and Ronald Earl Stahl.

1.21 On June 2, 1979, defendants William A. Collard, Ronald Earl Stahl, Mark Raymond Emerson, Eli W. Nixon, David P. McDaniel, Benjamin Bernstein and Michael D. Kelley were bona fide newsmen:

a. William A. Collard and Ronald Earl Stahl were employed as chief photographer and reporter, respectively, by KOCO-TV, the ABC affiliate in Oklahoma

City, Oklahoma. Testimony of William A. Collard and Ronald Earl Stahl; Defendants' Exhibits 56 and 59.

b. Mark Raymond Emerson and Eli W. Nixon were employed as reporter and managing editor, respectively, of The Grove Sun, a newspaper of general circulation in Grove, Oklahoma, and its environs. Testimony of Mark Raymond Emerson and Eli W. Nixon; Defendants' Exhibits 36 and 42.

c. David P. McDaniel was employed as a photographer by the Oklahoma Publishing Company, publisher of The Daily Oklahoman, The Oklahoma City Times, and The Sunday Oklahoman, newspapers of general circulation in Oklahoma City, Oklahoma and the State of Oklahoma. Testimony of David P. McDaniel.

d. Benjamin Bernstein was a reporter for The Oklahoma Daily, the student newspaper of the University of Oklahoma, Norman, Oklahoma. Affidavit of Benjamin Bernstein; Defendants; Exhibit 35.

1.22 The protestors began their protest march at approximately 6:30 A.M. on June 2, 1979, at the Rocky Point Recreation Area, located on the northwest corner of Black Fox Station (Point RP on Plaintiff's Exhibit 2.) The march proceeded in a southerly direction outside the perimeter fence through heavy underbrush. The protestors arrived at Point A on Plaintiff's Exhibit 2 at approximately 8:00 A.M., at which time the protestors held a conference concerning where they would go after crossing the perimeter fence. Defendants, who had accompanied the protestors from Point RP to Point A, did not participate in the protestors' discussion. Testimony of Ronald Earl Stahl and William A. Collard. However, because the defendants had accompanied the protestors, defendants were able to witness and overhear the protestors' discussion and decision to march to the core site rather than

occupy PSO buildings within the perimeter fence. Testimony of Mark Raymond Emerson, Eli W. Nixon and Ronald Earl Stahl.

1.23 Defendants did not know prior to the beginning of the protestors' march where the protestors would cross the perimeter fence, where the protestors would first encounter the Sheriff, or where the arrests of the protestors would occur. Testimony of Ronald Earl Stahl and William A. Collard.

1.24 Defendants were not informed prior to the beginning of the protestors' march that PSO would grant further access to Black Fox Station from the designated public viewing area on June 2, and did not know whether or not they would be able to witness and report the protestors' initial encounter with the Sheriff and arrests from outside the perimeter fence or the designated public viewing area. Testimony of Ronald Earl Stahl and William A. Collard.

1.25 In order to witness and report the protest, including the protestors' initial encounter with the Sheriff and arrests, defendants crossed the fence boundary line of Black Fox Station, at or near Point A on Plaintiff's Exhibit 2, between 8:00 and 8:30 A.M. on June 2, 1979. Testimony of Ronald Earl Stahl, William A. Collard, Mark Raymond Emerson, Eli W. Nixon, David P. McDaniel and Michael D. Kelley; Affidavit of Benjamin Bernstein, Defendants' Exhibit 61. Defendants first decided to cross the fenced boundary line after they arrived at Point A on Plaintiff's Exhibit 2. E.g., Testimony of Ronald Earl Stahl, William A. Collard, David P. McDaniel and Vicki Jean Monks. Prior to crossing the fenced boundary line, defendants saw signs similar to Plaintiff's Exhibit 1 posted on the fence and, soon after they had crossed the perimeter fence of Black Fox Station, heard a PSO official announce, "You are trespassing on private property and are subject to arrest." E.g., Testimony of Ronald Earl Stahl.

1.26 The protestors continued their march from Point A on Plaintiff's Exhibit 2 in an easterly manner. They first encountered the Sheriff at Point C on Plaintiff's Exhibit 2. The announcement of arrest by Sheriff Ward occurred at Point D on Plaintiff's Exhibit 2. The protestors were "booked," i.e., issued citations for entry without permission, in mobile booking vans located at Point E on Plaintiff's Exhibit 2. Defendants accompanied the protestors from Point A to Point E. Testimony of Ronald Earl Stahl.

1.27 Defendants were with the protestors when the protestors first encountered the Sheriff at Point C on Plaintiff's Exhibit 2. No newsmen other than the defendants were with the protestors at that time. Testimony of Ronald Earl Stahl.

1.28 Defendants were with the protestors when Sheriff Ward made the arrests, at Point D on Plaintiff's Exhibit 2. No newsmen other than the defendants were in the immediate vicinity of the protestors at that time. Defendant Ronald Earl Stahl observed other newsmen behind Sheriff Ward at that time. Testimony of Ronald Earl Stahl; Defendants Exhibits 41, 57 and 58. Defendants' Exhibit 41 is a photograph of Sheriff Ward making the arrests. The persons behind Sheriff Ward are the other newsmen seen by defendant Ronald Earl Stahl at the time the arrests were made. The newsmen behind Sheriff Ward came no closer to the protestors than indicated in that photograph prior to the time the booking occurred. Testimony of Ronald Earl Stahl.

1.29 Neither the place where the protestors first encountered the Sheriff (Point C on Plaintiff's Exhibit 2) nor the place where the arrests were made (Point D on Plaintiff's Exhibit 2) could be observed from outside the perimeter fence or the designated public viewing area (Point F on Plaintiff's Exhibit 2). Testimony of Harvey E. Sollars.

1.30 Approximately fifteen to twenty newsmen covered the June 2 protest from the public viewing area (Point F on Plaintiff's Exhibit 2). When the protestors first came into view from the public viewing area (at Point X on Plaintiff's Exhibit 2), the newsmen in the public viewing area demanded that they be allowed further access, which was granted by PSO. PSO personnel escorted those newsmen to a spot generally north of where the arrests were made, informed them not to go further, and distributed Defendants' Exhibit 28 to them.

1.31 Defendants were arrested and charged with entry without permission.

1.32 There were no unusual hazards to defendants' safety on Black Fox Station on June 2. Testimony of Ronald Earl Stahl and William A. Collard.

1.33 Defendants did not interfere with any construction activities at Black Fox Station on June 2. Testimony of Ronald Earl Stahl, William A. Collard and Harvey E. Sollars.

1.34 Defendants did not interfere with the Sheriff's arrests of the protestors on June 2. Testimony of Deputy Sheriff Fritz Freeman, Ronald Earl Stahl and William A. Collard. Sheriff Ward and Deputy Sheriff Fritz Freeman did not ask defendants to move out of the way at any time on June 2. Testimony of Ronald Earl Stahl and William A. Collard. Defendants did not interfere with the booking procedure on June 2. Testimony of Deputy Sheriff Fritz Freeman, Ronald Earl Stahl and William A. Collard.

1.35 Defendants caused no physical harm to Black Fox Station on June 2. Testimony of Harvey E. Sollars, Ronald Earl Stahl and William A. Collard.

1.36 Defendants crossed the fenced boundary line at Black Fox Station on June 2 solely to cover the protest as newsmen, not to demonstrate against nuclear

power or PSO's plans to build a nuclear electric power generating facility at Black Fox Station. Testimony of Ronald Earl Stahl and William A. Collard.

1.37 Some of the defendants and their employers published news stories about the June 2, 1979 protest that included video and/or verbal descriptions of, among other things, the protestors' initial encounter with the Sheriff and arrests. Testimony of Ronald Earl Stahl and William A. Collard (Defendants' Exhibits 48 through 55, 57), Affidavit of Benjamin Bernstein, Defendants' Exhibit 61; Testimony of David P. McDaniel; Testimony of Michael D. Kelley (Defendants' Exhibit 35).

1.38 PSO obtained for the Sheriff the citation forms issued to the protestors and defendants on June 2. Testimony of Harvey E. Sollars.

1.39 PSO rented at its expense the trailers used by the Sheriff as the mobile booking units on June 2. Testimony of Harvey E. Sollars.

1.40 PSO employees wrote the citations issued to the protestors and defendants on June 2. Testimony of Harvey E. Sollars.

1.41 PSO paid for the buses rented by the Sheriff for the purpose of transporting protestors to jail on June 2, if that had become necessary. Testimony of Harvey E. Sollars.

1.42 PSO property known as Black Fox Station was at all relevant times an enclosed yard within the meaning of 21 Oklahoma Statutes Subsection 1835.

1.43 Black Fox Station was closed to the general public and newsmen June 2, 1979 with the exception of the referred to "public viewing area."

The Court concludes as a matter of law that the actions of PSO in connection with the Black Fox Station on June 2, 1979 which have been objected to constitute state action

for purposes of application of the First and Fourteenth Amendments of the United States Constitution and Article II, Subsection 2, 7, and 22 of the Oklahoma Constitution to determine whether or not the contested actions are proper.

The United States Supreme Court case of *Jackson v. Metropolitan Edison Company*, 419 United States 345 (1974) is distinguishable on its facts. *Jackson* involved action taken by a utility company in deprivation of alleged property rights of a customer. The instant case, however, involves not only the normal utility relationships with government such as, for example, monopoly status and State regulation by a utility commission, but also those additional governmental relationships associated with the proposed nuclear activity and related subsidies. The Court particularly notes that Associated Electric Cooperative, Inc., and Western Farmers Electric Cooperative, both rural cooperatives, are minority owners of the Black Fox Station and that rural electric cooperatives have been previously determined to be instrumentalities of the United States. Another notable distinguishing factor is the working relationship existing between State officials and PSO on June 2, 1979. PSO supplied complaint forms, trailers and other equipment for the purpose of dealing with the protest, and paid PSO employees were utilized in the booking process. It must be emphasized also that the instant case involves the initial stages of the criminal process as opposed to the assertion of a property right or interest, and that the criminal process is an exclusively governmental function.

Since Constitutional rights are thus afforded, the next inquiry must concern the extent of the Constitutional rights of the Defendants as members of the press on June 2, 1979. The full scope of the protection afforded by the First Amendment has not been defined, and there are instances of conflicting opinions contained in the dictum of decisions of appellate courts.

Does the First Amendment protect the gathering of information? The question has not been directly addressed. State and lower Federal courts appear to have stated different opinions in their cases, and there is no separate body of law concerning the special function of the press and society's particular interest in that function. United States Supreme Court cases and other cases which are relative to this case include among others:

Pell v. Procunier, 417 U.S. 817 (1974)

Branzburg v. Hayes, 408 U.S. 665 (1972)

Los Angeles Free Press, Inc., v. Los Angeles, 88 Cal. Reporter 605 (1970)

Zemel v. Rusk, 381 U.S. 1 (1965)

Houchins v. KOED, Inc., 98 S. Ct. 2588 (1978)

United States v. Cianfrani, 573 F.2d 835 (1978)

Oklahoma Publishing Company v. District Court of Oklahoma County, 555 P.2d 1286 (1976)

From an examination of these cases, a number of principles are ascertained, primarily from the dicta of the cases rather than the precise holdings:

- 1) It appears that the press is not immune from restrictions or regulations.

- 2) The First Amendment does not guarantee to the press a Constitutional right of special access to information or places not available to the general public.

- 3) The First Amendment does not carry with it an unrestrained right to gather information.

- 4) The First Amendment does not in the interest of securing news or otherwise confer a license on a reporter to violate otherwise valid criminal laws.

5) Newsmen have no Constitutional rights of access to the scenes of crimes when the general public is excluded.

Dicta contained in the Oklahoma case of Oklahoma Publishing Company v. District Court of Oklahoma County is of particular interest as being the expression of our own Supreme Court. The justices specifically referred to "the First Amendment right of the news media to reasonable access to the news" and stated that this right "may in certain circumstances be balanced against and outweighed by other legitimate State interests." The case further asserts the general concepts mentioned above, stating that "the guarantee of the First Amendment does not guarantee the press a Constitutional right of special access to information not available to the public generally," and that "there is no Constitutional right of access to the scenes of crimes or disaster where the general public is excluded. "This case was reversed on appeal to the United States Supreme Court for other reasons, apparently on the basis that the press may not be prohibited from truthfully publishing information gathered at a public hearing where they were, in fact, present with the knowledge of the presiding judge and without objection. See Oklahoma Publishing Company v. District Court of Oklahoma County 555 P.2d 1286 (1976), Reversed 430 U.S. 308 (1977).

This Court concludes as a matter of law, therefore, that there is a First Amendment right of the news media to reasonable access to the news such as is available to the public generally. The issue in this case simply stated is then as follows: Whether under the factual circumstances of this case as presented, the public, engaged in the process of gathering news and information for public distribution, may claim Constitutional protection for its actions.

Cox Broadcasting Corporation v. Cohn, 420 U.S. 489 (1975), has suggested that the public right to be informed of Judicial proceedings rests upon the founda-

tion of the First Amendment, and Branzburg does not suggest that there is no Constitutionally protected right of public access. Indeed, the concept of public right of access as a Constitutionally protected right is implicit in the cases cited, and is specifically referred to in the case of *Oklahoma Publishing Company v. Oklahoma County*.

This concept has been proposed before as the real issue where questions of access and receiving information are involved. It is an issue which has not, however, to my knowledge been directly approached or decided by appellate courts. There is nothing available to a trial court such as this one to assist in determination of this issue upon the facts of this case other than the dicta of previous appellate decisions already mentioned. Of particular interest at this point is the concept that there is no protected right of access to crime scenes, and the concept that the First Amendment does not confer a license to violate otherwise valid criminal laws. These concepts are presented as dicta in appellate cases. Dicta, of course, concerns points not necessarily involved in a decision, and is not binding upon other courts when the exact issue is a matter for decision. Dicta must be respected, but it is not controlling.

It seems clear to this Court that a right of reasonable access to newsworthy events exists under the protection of the First Amendment; that it is a public right and limited to the right of the public in any given circumstances. To further state as a matter of law that this right in all cases must give way to violation of a criminal statute appears arbitrary and unwarranted. The Oklahoma Supreme Court, as previously cited, has stated that the right of access may in certain circumstances be balanced against other legitimate State interests, and this Court concludes that in the interest of protecting a Constitutional right of access a balancing test must be applied to the circumstance of each case which balances the right of the public and the press to reasonable access of news-

worthy events against the interest of the State in enforcing the statute or law violated, or other legitimate interest. Each and every claim of First Amendment rights should be evaluated in its particular context.

In this case, the right of access to news must be weighed against several opposing State interests: The right of PSO to be secure in its property rights, the normal police power of the State, and its duty to maintain public order and enforce criminal statutes. It must be remembered that the right of property is also protected by law.

In making a balancing test the total circumstances must be considered. At this point it is helpful to emphasize further facts arising from the evidence. We are dealing with three categories of reporters, journalists and other newsmen present at the Black Fox Station on June 2, 1979. One category consists of newsmen initially located at the public viewing area. A second category consists of those newsmen crossing the fence and marching with the protestors with the intent to cover the news story. The Court finds that these persons either knew or should have known of PSO's intent to prosecute this conduct. These reporters were, for the most part, arrested and booked. A third category consists of the fence-crossing reporters who were not arrested. The first group, in the public viewing area, upon finding they could not observe all significant activity as promised from that area, requested closer coverage, which was granted to them.

The intent of PSO in exercising restrictions on the press was admittedly to limit the content of the news which would be later distributed by the media. The intent of PSO in taking this action is an ignoble one hardly compatible with the rights of a free people. Does this objectionable intention enter in as a part of the balancing test? It must, for it is the expression of an in-

tent to impose a limitation on First Amendment rights by utilizing the criminal statutes.

However, there are further considerations. The events transpiring between the fence and the booking area have no special significance. Very little was gleaned by the media which would not have been obtainable by other means compatible with the PSO rules of order provided for press coverage of the protest. Nor was there any reason to believe that anything particular of special consequence would be missed entirely.

Also, PSO did not deny permission to any of the reporters to witness the booking procedure, an initial stage of the criminal process, and a significant activity. Nothing was missed by the viewing area reporters other than the march to the looking area and the initial arrest announcement by the Sheriff due to the PSO relaxation of the initial restrictions. Had these reporters been strictly confined to the viewing area it would have added additional weight for a finding of an unlawful denial. However, the fact that their coverage was not actually limited to a significant degree weighs against such a finding, and nullifies to a great extent allegations that access was unlawfully denied. The press is not immune from restrictions or regulations that do not unreasonably deny rights of access.

On the government side of the scale, officials were faced with a mass act of civil disobedience with unknown characteristics and a possibility of a hostile confrontation or violence. Sheriff's deputies were there for the purpose of protecting property rights of PSO and to maintain order in a process involving hundreds of alleged offenders.

A weighing of respective press and government interests in the context of the total circumstances of the June 2, 1979 protest, in the opinion of the Court, indicates that the legitimate rights of the State have outweighed the arrested rights of access. The restrictions actually im-

posed did not deny access of the press to particularly significant news, and the Court concludes that the press right of access to the news has not been unreasonably denied.

Defendants have also alleged that the press was denied equal protection of the laws under State and Federal Constitutions. With this assertion the Court cannot agree. The equal protection concept forbids arbitrary discrimination by states in criminal cases, and discriminatory enforcement of criminal laws is a violation of equal protection of the laws in some instances. In the event discriminatory enforcement is deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification, such as arrest of so-called underground press as opposed to establishment press, equal protection has been violated. However, a person otherwise guilty of violating the criminal laws cannot defend by showing that others equally guilty have not been prosecuted.

Herein the Defendants have not shown a conscious, intentional discrimination in enforcement which would entitle them to a dismissal as a matter of law under the equal protection concept. It is true that some reporters were arrested and others were not. But those arrested were believed to have committed an act of trespass, while generally those not arrested were not believed to have committed such an act. This is not an unlawful classification. The evidence indicating that two reporters allegedly trespassing were not arrested does not disclose that they were intentionally not arrested because of some deliberate arbitrary classification individouous in nature. The incident rather has the appearance of laxity in enforcement, and mere laxity of enforcement is not a denial of equal protection.

Lastly, testimony of a number of the Defendants revealed that they believed they must cross the fence with the protestors in order to meet their professional obliga-

tion to report the news. This is a decision which they profess to have made as a matter of individual conscience and sense of obligation. However, the matter remains as a deliberate violation of law, perhaps amounting to an act of civil disobedience. Insofar as it may be symbolic it is perhaps itself an act of protest. It is a refusal to obey the law which must be coupled with a willingness to accept the legal consequences, whatever they may be. A person committing an act of civil disobedience may claim an exemption from an obligation to obey a particular law on moral or professional grounds, but that person may not claim immunity from application of sanction for committing that offense.

Upon a careful consideration of the law relating to this matter and the evidence presented to the Court, the Court concludes that the motions of the several Defendants to dismiss the prosecution of this case on Constitutional grounds must be overruled and a judgment of guilt entered as to each of the defendants on the charge of trespass after being forbidden as filed by the State of Oklahoma. Judgment of guilt is hereby pronounced, and the Clerk of the Court is directed to enter the judgment of record. An exception is noted on behalf of each of the defendants to all of the rulings of the Court.

/s/ David Allen Box
DAVID ALLEN BOX
Judge of the District Court

EXHIBIT A

List Of Witnesses

1. Dr. Amory Lovins, who testified regarding certain government subsidies to the nuclear power industry.
2. Mr. Vaughn L. Conrad, Manager of Licensing and Compliance of Public Service Company of Oklahoma ("PSO").
3. Mr. Harvey E. Sollars, PSO's Security Coordinator for Black Fox Station.
4. Mr. Richard B. Risk, Jr., PSO's Manager of Nuclear Information.
5. Mr. David P. McDaniel, defendant.
6. Deputy Sheriff Fritz Freeman.
7. Sheriff Amos Ward.
8. Mr. Peter M. Crow, owner of the Grove Sun, employer of defendants Mark Raymond Emerson and Eli W. Nixon.
9. Ms. Vicki Jean Monks, defendant.
10. Mr. Michael D. Kelley, defendant.
11. Mr. Mark Raymond Emerson, defendant.
12. Mr. Eli W. Nixon, defendant.
13. Mr. Ronald Earl Stahl, defendant.
14. Mr. William A. Collard, defendant.

EXHIBIT B

List of Exhibits

State's Exhibits

1. Sign posted on perimeter fence of Black Fox Station.
2. Aerial photograph of Black Fox Station.
3. Photograph of Mr. William A. Collard, defendant, taken June 2, 1979.

Defendants' Exhibits

1. [blank in original]
2. "An Analysis of Federal Incentives Used to Stimulate Energy Production," a report prepared for the United States Department of Energy by Pacific Northwest Laboratory, operated by Battelle Memorial Institute [the "Battelle Report"].
3. Testimony of Duane Chapman, Associate Professor of Resource Economics, Department of Agricultural Economics, Cornell University, before Subcommittee of Energy, Committee on Resources, Land Use, and Energy, California State Assembly, regarding Decommissioning, Taxation and Nuclear Power Cost-Economic Implications of the Three Mile Island Accident for California, August 14, 1979, Los Angeles, California.
4. Letter from PSO to Office of Nuclear Reactor Regulation, Division of Project Management, United States Nuclear Regulatory Commission ("NRC") dated March 21, 1979, enclosing certain loan guarantee commitments by the Rural Electrification Administration ("REA") to Associated Electric Cooperative, Inc. ("Associated") and Western Farmers Electric Cooperative ("Western") and Black Fox Nuclear Electric Generating

Station Ownership Agreement among PSO, Associated and Western dated September 20, 1978.

- 5A. Letter from PSO to Division of Project Management and Division of Site Safety and Environmental Analysis, NRC, dated January 3, 1978, regarding PSO's requests for a Limited Work Authorization for Black Fox Station.
- 5B. NRC Limited Work Authorization for Black Fox Station, Unit Nos. 1 and 2.
- 5C. NRC Amendment No. 1 to Limited Work Authorization for Black Fox Station, Unit Nos. 1 and 2.
- 5D. Letter from PSO to Division of Project Management and Division of Site Safety and Environmental Analysis, NRC, dated November 7, 1978, regarding amendment to Limited Work Authorization.
- 5E. NRC Amendment No. 2 to Limited Work Authorization for Black Fox Station, Units 1 and 2.
- 5F. Letter from PSO to Division of Project Management and Division of Site Safety and Environmental Analysis, NRC, dated July 10, 1979, regarding amendment to Limited Work Authorization.
- 5G. Amendment No. 3 to Limited Work Authorization for Black Fox Station, Units 1 and 2.
- 6A. Letter from PSO to Industrial and Solid Waste Division, Oklahoma State Department of Health, dated March 9, 1978, enclosing Application for Solid Waste Disposal Permit.
- 6B. Letter to PSO from Oklahoma State Department of Health, dated April 27, 1978, enclosing Permit to Construct, Operate and Maintain a Construction/Demolition Disposal Site.

- 6C. Letter to PSO from Oklahoma State Department of Health, dated February 27, 1979, regarding Application for Renewal of Permit for Construction/Demolition Disposal Facility.
- 6D. Letter from PSO to Solid Waste Service, Oklahoma State Department of Health, dated March 19, 1979, enclosing Application for Renewal of Construction/Demolition Disposal Permit for Black Fox Station.
- 6E. Letter to PSO from Oklahoma State Department of Health dated March 27, 1979, enclosing Renewal of Permit for Construction/Demolition Land Fill for Black Fox Station.
- 6F. Letter to PSO from Oklahoma State Department of Health dated August 14, 1979, regarding sanitary land fill regulations.
- 7A. Letter from PSO to Permits and Support Branch, United States Environmental Protection Agency, dated October 7, 1976, enclosing data regarding Application for National Pollutant Discharge Elimination System ("NPDES") Permit to Discharge Waste Water from Black Fox Station.
- 7B. Letter from PSO to Permits Branch Region VI, United States Environmental Protection Agency, dated November 29, 1977, regarding proposed NPDES Permit No. OK0034614 for Black Fox Station.
- 7C. Letter from PSO to Navigation Branch, United States Army Corps of Engineers, dated March 10, 1978, requesting information regarding permits necessary to construct a railroad bridge over Inola Creek and Pea Creek in Rogers County, Oklahoma.
- 7D. United States Environmental Protection Agency NPDES Determination, issuing Permit No. OK0034614 (Permit attached).

- 7E. PSO intra-company correspondence attaching NPDES Determination, issuing Permit No. OK0034614 from United States Environmental Protection Agency for Waste Water Discharge of Black Fox Station.
- 8A. Letter to PSO from Oklahoma Water Resources Board dated November 5, 1979, regarding Application No. 79-6 to the Oklahoma Water Resources Board for the construction of a dam and reservoir to be used as a pre-settling pond dam for Black Fox Station.
- 8B. Letter from PSO to Oklahoma Water Resources Board dated September 20, 1979, enclosing a formal description of PSO's temporary runoff pond and the proposed pre-settling pond.
- 8C. PSO's Black Fox Station pre-settling pond dam design memorandum, prepared by Black and Veatch, consulting engineers.
- 8D. Letter from PSO to Oklahoma Water Resources Board dated October 8, 1979, enclosing Application for Dam and Reservoir Permit for construction of a pre-settling pond.
- 8E. Oklahoma Water Resources Board Waste Disposal Permit No. WD-75-088 to PSO for Black Fox Station, effective February 13, 1979.
- 8F. Letter from Oklahoma Water Resources Board to PSO dated February 20, 1979, enclosing Oklahoma Water Resources Board Order dated February 13, 1979.
- 8F. (A) Oklahoma Water Resources Board Order No. WQ-79-02-13-03 regarding Application No. WD-75-088, dated February 13, 1979.
- 8G. Letter from PSO to Oklahoma Water Resources Board dated October 21, 1975, enclosing Application for Oklahoma Waste Disposal Permit.

- 8H. Letter to PSO from Oklahoma Water Resources Board dated November 10, 1977, acknowledging receipt of PSO's request that the Oklahoma Water Resources Board provide a water quality certification under Section 401 of P.L. 92-500 for the proposed Black Fox Station.
- 8I. Receipts from Oklahoma Water Resources Board to PSO dated September 27, 1977, and August 2, 1978.
- 8J. Oklahoma Water Resources Board Permit to appropriate stream water from the Verdigris River for Black Fox Station.
- 9A. Letter from PSO to Air Quality Service, Environmental Health Services, Oklahoma State Department of Health, dated December 15, 1977, enclosing application for installation permit for Black Fox Station.
- 9B. PSO intra-company correspondence dated January 26, 1978, attaching Permit No. 77-092-C from the Oklahoma State Department of Health, granting permission to construct air emission facilities at Black Fox Station.
- 9C. Letter from PSO to Air Quality Service, Environmental Health Services, Oklahoma State Department of Health, dated December 11, 1978, enclosing application for an operating permit for concrete batching plants for Black Fox Station.
- 10A. Letter from PSO to Water Quality Service Division, Oklahoma State Department of Health, dated May 5, 1978, enclosing application to install a sewage treatment facility at Black Fox Station.
- 10B. Letter to PSO from Oklahoma State Department of Health dated August 7, 1978, enclosing Permit No. SL-78-297 for the construction of two package sewage treatment plants, two lift stations and collection systems to serve the construction phase of Black Fox Station.

- 11A. Letter from PSO to District Engineer, United States Army Corps of Engineers, dated October 6, 1976, enclosing application for construction permits and approval for dredge and fill operations for certain facilities at Black Fox Station (river intake structure; barge slip; outfall structure; construction water suction line; and transmission line crossings).
- 11B. Letter from PSO to Department of the Army, Tulsa District Corps of Engineers, dated October 19, 1977, enclosing certain amended documents in connection with PSO's application to the Corps of Engineers dated October 6, 1976 (Defendants' Exhibit 11A).
- 11C. Department of the Army, Corps of Engineers, notice of authorization of permit to construct and maintain an intake structure, five protective dolphins, an outfall structure, a barge slip, a construction water intake and three overhead power line crossings, issued to PSO on July 27, 1978.
- 11D. Department of the Army permit to PSO dated July 27, 1978, regarding performance of work in or affecting navigable waters and discharge of dredged or fill material into navigable waters.
- 11E. Letter to PSO from Department of the Army, Tulsa District, Corps of Engineers, dated July 19, 1979, regarding request to revise special condition "y" of Department of the Army Permit No. OKR3000717.
- 11F. Letter from PSO to Department of the Army, Tulsa District Corps of Engineers dated August 22, 1979, enclosing changes to Permit No. OKR3000717.
- 11G. Letter to PSO from Department of the Army, Tulsa District Corps of Engineers, dated September 20, 1979, revising Permit No. OKR3000717 as requested by PSO's letter of August 22, 1979.

- 12A. Letter from PSO to Corps of Engineers dated October 22, 1979, requesting addition of two special conditions to easements issued for Black Fox Station.
- 12B. Department of the Army Easement for Right-of-Way for Electric Power Transmission or Communication Facilities No. DACW56-2-78-105.
- 12C. Department of the Army License No. DACW56-3-78-105 for a temporary work area for a water intake structure, barge slip, power lines, discharge ditch and the construction, operation and maintenance of a water suction line.
- 12D. Department of the Army Easement for Right-of-Way No. DACW56-2-78-1048 for Drainage Ditch.
- 12E. Department of the Army Easement for Right-of-Way No. DACW56-2-78-1047 for Canal.
- 12F. Department of the Army Easement for Right-of-Way No. DACW56-2-78-1046 for Water Pipeline.
- 13A. PSO's application to the Oklahoma Corporation Commission dated March 2, 1978, for authorization to construct and operate a railroad spur track across county roads in Rogers County, Oklahoma.
- 13B. Oklahoma Corporation Commission Order No. A39744, authorizing PSO to construct and operate railroad spur tracks across certain county roads in Rogers County, Oklahoma.
- 14A. PSO intra-company correspondence dated May 17, 1978, attaching certified copy of the Rogers County Board of County Commissioners Order closing certain section line roads in Black Fox Station.
- 14B. PSO intra-company correspondence dated July 18, 1978, attaching copy of Resolution of Board of County Commissioners of Rogers County, Oklahoma authorizing use of public road right-of-way and connection to existing county road.

- 15A. United States Department of Transportation, Federal Aviation Administration, Notice of Proposed Construction or Alteration for Three Hundred Fifty Foot Meteorological/Microwave Tower.
- 15B. Notices by PSO to United States Department of Transportation, Federal Aviation Administration, regarding meteorological/microwave tower.
16. Letter to PSO from Department of the Army, Tulsa District Corps of Engineers dated March 16, 1978, regarding proposed construction of two bridges over Inola Creek and one over Pea Creek in Rogers County, Oklahoma.
17. Letter to PSO from United States Department of Energy dated October 18, 1978, enclosing copies of Contract for Furnishing Uranium Enrichment Services dated September 30, 1979.
18. Petition, Amendment to Petition in Condemnation, Instructions to Commissioners, and Orders in PSO v. Beaver, et al., No. C-75-260 (District Court of Rogers County, Oklahoma), Exhibit A to Defendants' Brief in Support of Motions to Dismiss filed herein on November 13, 1979.
19. Report of Commissioners in PSO v. Beaver, et al., No. C-75-260 (District Court of Rogers County, Oklahoma), attached to Defendants' Offer of Documents filed herein on November 16, 1979.
20. Affidavit of Rebecca L. Rowe, attaching certain documents, including the general information portion of the Second Amended Application for Construction Permit and Operating Licenses Class 103 filed with NRC on December 8, 1978, by PSO, Associated and Western, Exhibit B to Defendants' Brief in Support of Motions to Dismiss filed herein on November 13, 1979.
21. Supplement to Supplemental Mortgage and Security Agreement between Associated and the

United States of America acting through REA and National Rural Utilities Cooperative Finance Corporation dated January 24, 1979, Exhibit C. to Defendants' Brief in Support of Motions to Dismiss filed herein on November 13, 1979.

22. Stipulation and Agreement and Docket Sheet in State v. Agnew, Case Nos. CRM-78-536 to 880 (with noted exceptions), Exhibit D to Defendants' Brief in Support of Motions to Dismiss filed herein on November 13, 1979.
23. Information, Amended Information, and Order of Dismissal in State v. Agnew, et al., No. CRM-79-350, et al., Exhibit F to Defendants' Brief in Support of Motions to Dismiss filed herein on November 13, 1979.
24. Affidavit of Jim Back, attaching UPI Teletype dated May 30, 1979, Exhibit N to Defendants' Brief in Support of Motions to Dismiss filed herein on November 13, 1979.
25. Affidavit of Stephen Robertson, editor of the Oklahoma Daily, attaching letter to the editor of The Oklahoma Daily from Mr. Richard B. Risk, Manager of Nuclear Information for PSO, Exhibit P to Defendants' Brief in Support of Motions to Dismiss filed herein on November 13, 1979.
26. Notebook kept by Mr. Harvey E. Sollars, PSO's Security Coordinator for Black Fox Station, regarding the October, 1978, protest by Sunbelt Alliance.
27. Notebook kept by Mr. Harvey E. Sollars, PSO's Security Coordinator for Black Fox Station, regarding the June 2, 1979, protest by Sunbelt Alliance.
28. Letter from Mr. Richard B. Risk, Jr., PSO's Manager of Nuclear Information, to news media representative, dated June 2, 1979.

29. Photograph taken by defendant David P. McDaniel on June 2, 1979, published on the front page of the Sunday Oklahoman on June 3, 1979.
30. Photograph taken by defendant David P. McDaniel on June 2, 1979, subsequently published in the Daily Oklahoman.
31. Pages III-1 through III-12 of the Application by PSO, Associated and Western to NRC for Permits to Construct and Operate Black Fox Station.
32. Pages IIIL-1 and IIIL-1a of the Application by PSO, Associated and Western to NRC for Permits to Construct and Operate Black Fox Station.
33. Pages IIIM-1, and IIIM-3 through IIIM-6 of the Application by PSO, Associated and Western to NRC for Permits to Construct and Operate Black Fox Station.
34. Memorandum of Agreement among PSO, Associated and Western dated June 1, 1978.
35. Affidavits of Defendant Michael D. Kelley, Exhibit J to Defendants' Brief in Support of Motions to Dismiss filed herein on November 13, 1979.
36. Affidavit of Defendant Mark Raymond Emerson, Exhibit L to Defendants' Brief in Support of Motions to Dismiss filed herein on November 13, 1979.
37. Photograph taken by defendant Mark Raymond Emerson of the October 7, 1978 protest.
38. Photograph taken by defendant Mark Raymond Emerson of June 2, 1979 protest.
39. Photograph taken by defendant Mark Raymond Emerson of June 2, 1979 protest.
40. Photograph taken by defendant Mark Raymond Emerson of June 2, 1979 protest.

41. Photograph taken by defendant Mark Raymond Emerson of June 2, 1979 protest.
42. Affidavit of defendant Harold Wayne Nixon (Eli W. Nixon), Exhibit M to Defendants' Brief in Support of Motions to Dismiss filed herein on November 13, 1979.
43. Photograph taken by defendant Eli W. Nixon of October 7, 1978 protest.
44. Photograph taken by defendant Eli W. Nixon of October 7, 1978 protest.
45. Photograph taken by defendant Eli W. Nixon of June 2, 1979 protest.
46. Photograph taken by defendant Eli W. Nixon of June 2, 1979 protest.
47. List of KOCO-TV video news stories on tape for presentation to Court (stories are on Defendants' Exhibit 57).
48. Script of KOCO-TV news story broadcast.
49. Script of KOCO-TV news story broadcast.
50. Script of KOCO-TV news story broadcast.
51. Script of KOCO-TV news story broadcast.
52. Script of KOCO-TV news story broadcast.
53. Script of KOCO-TV news story broadcast.
54. Script of KOCO-TV news story broadcast.
55. Script of KOCO-TV news story broadcast.
56. Affidavit of Ronald Earl Stahl, Exhibit G to Defendants' Brief in Support of Motions to Dismiss filed herein on November 13, 1979.

57. Videotape of KOCO-TV news stories, scripts of which are Defendants' Exhibits 49-52.
58. Videotape of all footage shot by KOCO-TV on June 2, 1979.
59. Affidavit of William A. Collard, Exhibit H to Defendants' Brief in Support of Motions to Dismiss filed herein on November 13, 1979.
60. Certain newspaper articles regarding nuclear protests.
61. Affidavit of Benjamin Bernstein, Exhibit I to Defendants' Brief in Support of Motions to Dismiss filed herein on November 13, 1979.

APPENDIX C

IN THE DISTRICT COURT
IN AND FOR ROGERS COUNTY
STATE OF OKLAHOMA

Nos. CRM-79-373, 79-407

79-437, 79-512,

79-540, 79-547,

79-561, 79-635,

79-681

(Consolidated Cases)

STATE OF OKLAHOMA

Plaintiff,

vs.

BEN BERNSTEIN, WILLIAM A. COLLARD,
MARK RAYMOND EMERSON, MICHAEL D. KELLEY,
DAVID P. MCDANIEL, VICKI JEAN MONKS, ELI W. NIXON,
RONALD EARL STAHL and STEVEN WOLFSON,
Defendants.

JUDGMENT AND SENTENCE
(MISDEMEANOR)

NOW on this 21st day of May, 1980, there comes on for hearing the oral motions of the defendants, Ben Bernstein, William A. Collard, Mark Raymond Emerson, Michael D. Kelley, David P. McDaniel, Vicki Jean Monks, Eli W. Nixon, Ronald Earl Stahl and Steven Wolfson, that this Court pronounce judgment and sentence in this cause pursuant to the Court's Findings and Conclusions delivered from the bench on January 15, 1980 and filed of record herein on January 21, 1980. The Court finds:

1. The defendants were each charged by Amended Information with trespass after being forbidden, in violation of 21 Okla. Stat. § 1835 (1971).

2. On October 23, 1979, the cases against each of the defendants were consolidated by order of the Court, pursuant to 22 Okla. Stat. § 438 (1971).

3. Each of the defendants pleaded not guilty, filed a Motion to Dismiss on constitutional grounds, and was duly and legally tried by trial to the Court on November 20, 21, 28, 29 and 30, 1979.

4. On January 15, 1980, pursuant to prior notice to the parties, the Court delivered its findings and conclusions from the bench, overruled defendants' Motions to Dismiss, and found and concluded that each of the defendants was guilty of the offense charged. The Court did not, however, pronounce sentence in open court on said date and has not pronounced sentence in accordance with the laws of the State of Oklahoma in this cause until this date.

5. Each of the defendants was represented by an attorney herein and was informed by this Court and by said attorney of the nature of the information, his plea and the Court's findings and conclusions.

6. The attorneys for the defendants herein have filed herein their written waivers of appearance for purpose of judgment, pursuant to 22 Okla. Stat. § 963 (1971).

7. On January 25, 1980, each of the defendants filed herein his Motion for New Trial. This Court overruled and denied each of said Motions for New Trial on January 25, 1980.

8. The defendants' attorneys having been asked by the Court whether there is any legal cause to show why judgment and sentence should not be pronounced against each of the defendants, and having alleged no sufficient cause why judgment and sentence should not be pronounced against each of said defendants, and none appearing to the Court, the Court does now hereby

ORDER, ADJUDGE AND SENTENCE:

1. For the reasons announced by the Court in its Findings and Conclusions filed herein on January 21, 1980, each of the defendants, Ben Bernstein, William A. Collard, Mark Raymond Emerson, Michael D. Kelley, David P. McDaniel, Vicki Jean Monks, Eli W. Nixon, Ronald Earl Stahl and Steven Wolfson, is guilty of the offense of trespass after being forbidden, in violation of 21 Okla. Stat. § 1835 (1971).

2. Each of the defendants, Ben Bernstein, William A. Collard, Mark Raymond Emerson, Michael D. Kelley, David P. McDaniel, Vicki Jean Monks, Eli W. Nixon, Ronald Earl Stahl and Steven Wolfson, is fined the sum of \$25.00, and each of said defendants shall pay the costs herein, taxed at \$27.00, and in default of the payment of the fine and costs herein, shall be imprisoned in the Rogers County Jail for a period not exceeding one day for every one dollar of fine and costs herein.

3. The Court Clerk is directed to file this Judgment and Sentence of record in the above cases.

JUDGE DAVID ALLEN BOX
JUDGE DAVID ALLEN BOX

ATTEST:

JUNE LUNSFORD, Rogers County
Court Clerk

By /s/ Beverly Paul

STATE OF OKLAHOMA)
) SS.
ROGERS COUNTY)

I, June Lunsford, Court Clerk in and for said County and State, do hereby certify that the above and foregoing is a true and correct copy of the Judgment and Sentence in the case of the State of Oklahoma vs. Ben Bernstein, William A. Collard, Mark Raymond Emerson, Michael D. Kelley, David P. McDaniel, Vicki Jean Monks, Eli W. Nixon, Ronald Earl Stahl and Steven Wolfson, Nos. CRM-79-373, 79-407, 79-437, 79-512, 79-540, 79-547, 79-561, 79-635, and 79-681 (Consolidated Cases), as the same appears of record in my office.

Witness my hand and seal of this Court this 21 day of May, 1980.

JUNE LUNSFORD, Rogers County
Court Clerk

By /s/ Beverly Paul

FILED

DEC 15 1983

ALEXANDER L. STEVAS.
CLERK

Case No. 83-475

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

RONALD EARL STAHL, ET AL.
Petitioners,

vs.

THE STATE OF OKLAHOMA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT
OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

MICHAEL C. TURPEN
ATTORNEY GENERAL OF OKLAHOMA

DAVID W. LEE
ASSISTANT ATTORNEY GENERAL
CHIEF, CRIMINAL/FEDERAL DIVISION
COUNSEL OF RECORD

112 State Capitol Building
Oklahoma City, OK 73105
(405) 521-3921

ATTORNEYS FOR RESPONDENT

December, 1983

QUESTION PRESENTED FOR REVIEW

Whether the First Amendment immunizes newspersons from arrest and prosecution for trespass when they have violated a state law prohibiting such while reporting the arrest of demonstrators who also had trespassed upon private property.

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Case No. 83-475

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

RONALD EARL STAHL, ET AL.
Petitioners,

vs.

THE STATE OF OKLAHOMA,
Respondent.

On Petition for a Writ of Certiorari to the Court
of Criminal Appeals of the State of Oklahoma

RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

The Respondent, State of Oklahoma, by and through Michael C. Turpen, Attorney General of the State of Oklahoma, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Opinion of the Court of Criminal Appeals of the State of Oklahoma entered on June 22, 1983 and which was corrected on July 22, 1983.

OPINION BELOW

The Opinion of the Oklahoma Court of Criminal Appeals is reported at 665 P.2d 839 (Okla.Cr. 1983).

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S. § 1257(3).

RELEVANT CONSTITUTIONAL AND

STATUTORY PROVISIONS

The First Amendment to the Constitution of the United States provides, in pertinent part:

"No State shall . . . deprive any person of life, liberty or property, without due process of law. . . ."

Title 21 O.S.1971, § 1835(a) provided:

Whoever shall willfully or maliciously enter the garden, yard, or enclosed field of another after being expressly forbidden to do so by the owner or occupant thereof shall be deemed guilty of trespass and upon conviction thereof shall be fined in any sum not to exceed Twenty-five Dollars (\$25.00); provided, that anyone who willfully or maliciously enters any such garden, yard, or field, and therein commits or attempts to commit waste, theft, or damage shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not less than Fifty Dollars (\$50.00) nor more than Five Hundred Dollars (\$500.00), or by confinement in the

county jail for not less than thirty (30) days nor more than six (6) months, or both such fine and imprisonment.

Title 21 O.S.1971, § 92 provided:

"The term 'willfully' when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act or the omission referred to. It does not require any intent to violate law, or to injure another, or to require any advantage."

STATEMENT OF THE CASE

Ronald Earl Stahl and five (5) other persons (hereinafter referred to as the "Petitioners") were convicted of the crime of Trespass After Being Forbidden in violation of 21 O.S.1971, § 1835 in the District Court of Rogers County, State of Oklahoma. The Petitioners, who were represented by counsel, waived their right to a jury trial and the case was tried to the Court. The Court found the Petitioners guilty and fined each of them Twenty-five Dollars (\$25.00) plus costs.

The facts which were presented to the Court revealed that on June 2, 1979 a group of demonstrators who opposed the construction of a nuclear power facility, entered and occupied the grounds (which was known as Black Fox Station), a rural area north of Tulsa, Oklahoma. The Black Fox Station was owned by the Public Service Company

of Oklahoma (PSO). PSO and two rural cooperatives had agreed to develop nuclear power generating facilities on this area.

During the course of the demonstration 339 protestors crossed the fenced boundary lines and were arrested. Nine (9) newsmen, including the Petitioners in this case, were arrested after they also crossed the fence boundary line. Prior to the crossing of this line, the Petitioners were advised by a PSO official "You are trespassing on private property and are subject to arrest" (Tr. 387). The Petitioner Stahl also testified that he observed a sign posted on the fence which he believed stated "Private Property. Trespassers subject to arrest." (Tr. 392). Stahl claimed that they crossed the fenced boundary line in order to witness and report the protest and arrest of the demonstrators (Tr. 386, 390).

REASONS WHY THE WRIT SHOULD BE DENIED

No question exists as to the fact that the Petitioners violated the criminal trespass statutes of the State of Oklahoma since they entered upon land of PSO after being expressly forbidden to do so. The Petitioners, however, contend that the First Amendment grants an immunity from arrest and prosecution to newsmen engaged in such an endeavor. This contention is contrary to established First Amendment principles and is unwork-

able in that it would unduly interfere with the police power of the states.

First, nothing enunciated in the previous opinions of this Court regarding First Amendment principles supports the view that a newsperson is entitled to violate a state's criminal law simply because he or she is covering a news event. A newsperson "has no special privilege to invade the rights and liberties of others." Associated Press v. NLRB, 301 U.S. 103, 132-133 (1937).

In Zemel v. Rusk, 381 U.S. 1 (1965) the Court sustained the Government's refusal to validate passports to Cuba even though that restriction "render[ed] less than wholly free the flow of information concerning that country." Id., 381 U.S. at 16. The ban on travel was held to be constitutional and Chief Justice Warren, writing for the majority stated:

"[T]here are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow. For example, the prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right. The right to speak and publish does not carry with it the unrestrained right to gather information." 381 U.S. at 16, 17. [Emphasis added].

In the interest of securing news or otherwise, "[n]ewsmen have no constitutional right of access to the scenes of the crime or disaster when general public is excluded, . . ." Branzburg v. Hayes, 408 U.S. 665, 684-685 (1972). In Branzburg v. Hayes, supra, 408 U.S. at 684, this Court noted that:

"[i]t has been generally held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally."

Pell v. Procunier, 417 U.S. 817 (1974), and Saxbe v. Washington Post Co., 417 U.S. 843 (1974) involved First Amendment challenges to regulations that prevented reporters from conducting interviews with individually selected inmates of a prison. The Court held that the restriction on a journalist's newsgathering ability was constitutional in both cases. See also, Zurcher v. Stanford Daily, 436 U.S. 547 (1978), where the Supreme Court held that newsrooms were entitled to no greater protection than any other premises with regard to a search warrant seeking evidence of a crime.

In Houchins v. KQED, Inc., 438 U.S. 1 (1978), a radio and television broadcaster had been refused permission to inspect and photograph a particular portion of a jail in which alleged prisoner abuses occurred and in which an inmate

had committed suicide. This Court upheld the denial of access to the jail and stated that the freedom role of the press in informing the public contains only a freedom to communicate information after it had been obtained. Id., 438 U.S. at 9. Furthermore, the Court, relying on its previous decisions, stated:

"Under our holdings in Pell v. Procunier, supra, and Saxbe v. Washington Post, supra, until the political branches decree otherwise, as they are free to do, the media have no special right to access to the Alameda County Jail different from or greater than that accorded the public generally." 438 U.S. at 15-16.

Recent cases of the United States Supreme Court have not retreated from that holding. The media is not to be accorded special access that the general public would not be entitled to. In Gannett Co. Inc., v. De Pasquale, 443 U.S. 368 (1979), the Supreme Court upheld the authority of a state trial court to bar members of the public and the media from access to pretrial proceedings in a criminal case. In Richmond Newspapers, Inc. v. Commonwealth of Virginia, 448 U.S. 555 (1980), the Court distinguished its ruling in Gannett by holding that the public and the media were entitled to attend criminal trial under the guarantees of the First Amendment. However, the Court again did not grant any greater

right of access to the press than the general public. Chief Justice Burger explained the rationale behind the decision as follows:

" . . . a trial court room also is a public place where the people generally- and the representatives of the media- have a right to be present, and where their presence historically has been thought to enhance the integrity of quality of what takes place." 448 U.S. at 578.

The exercise of First Amendment rights have consistently been held to be subject to reasonable time, place and manner restrictions. See, Adderley v. Florida, 385 U.S. 39 (1966), where a conviction for trespass involving a demonstration upon jail grounds was upheld against First Amendment claims; and Lloyd Corp. v. Tanner, 407 U.S. 551 (1972), where the Supreme Court upheld the right of a privately owned shopping center to exclude draft and war protesters from those premises, even though the shopping center was generally open to the public. The government, as well as private entities, is entitled to restrict access to its property. United States Postal Service v. Council of Greenburgh Civil Associations, 453 U.S. 114, 129-130 (1981); Greer v. Spock, 424 U.S. 828, 836 (1976).

Since the Petitioners are not contending that the demonstrators had a First Amendment right to assemble on the property where they were

arrested, the press can claim no greater rights in this context than other citizens who were arrested.

The law in this country does not favor privileges. See, Branzburg v. Hayes, supra (news-persons not entitled to withhold subpoenaed material from grand jury notwithstanding his claim that disclosure would destroy his informant sources).

The Petitioners have set forth numerous factors which they contend demonstrate the purity of their motives and thus entitle them to immunity from arrest for trespass (Petition, p. 11). The very complexity of this formula demonstrates the unworkability of their proposal as opposed to the State's interest in maintaining order in the face of a mass demonstration.

A law enforcement officer attempting to control a crowd during a protest demonstration must be free to make instant decisions concerning who is violating the law. If, as the Petitioners suggest, a newsperson's motives and intent are to be weighed before he or she could be arrested, an officer would be placed at a critical disadvantage when attempting to arrest lawbreakers during a demonstration. Would the officer be required to take the person's word that he or she was trespassing merely to report concerning other person's breaking of the law? How would

the officer know whether the newsperson was participating in the protest themselves? Furthermore, who qualifies as a newsperson?

The myriad questions which would have to be answered in the context of a civil disturbance make the Petitioners' proposal totally inconsistent with efficient crowd control. It is not hard to visualize 42 U.S.C. § 1983 lawsuits being filed against law enforcement officers who arrested persons who claimed immunity from arrest as newspersons.

In recent years this Court has specifically stated its desire to simplify rules of arrest, search and seizure for law enforcement officers. United States v. Ross, 456 U.S. 798, 803-804 (1982). The new First Amendment principle urged by the Petitioners would unnecessarily complicate the doctrine of arrest, search and seizure in this area.

Finally, in order to uphold the Petitioners' contentions, this Court would be required to engraft a new specific intent requirement onto State trespass statutes.

Title 21 O.S.1971, § 1835(a), the trespass statute under which the Petitioners were convicted, is a general intent statute. Stahl v. State, 665 P.2d 839, 840 (Okla.Cr. 1983). It requires only that a person "willfully" enter the yard or enclosed field of another. Title 21

O.S.Supp.1979, § 92 stated that when an act is "[w]illfully" committed, "[i]t does not require any intent to violate the law." If the Petitioners' thesis were adopted in trespass cases the State would have to prove not only that a person who qualifies as a "newsperson" entered upon another's land illegally, but that they did so with the specific intent to violate the law.

Other unanswerable questions abound. Would a private citizen whose home had been burglarized be able to exclude the press from entry into the home to report on the arrest of the burglar and the investigation of the crime scene? Or could the reporter contend that since he or she had no intent to break the law that they had the right to remain at the crime scene until the newsworthiness of the event had ended?

The State responds to these questions and to the contentions of the Petitioners by stating that all persons, including newsmen should be held to be accountable for violations of the criminal law pertaining to trespass to the same degree that other citizens are.

CONCLUSION

For the reasons stated, it is respectfully requested that the Petition for Writ of Certiorari be denied.

Respectfully submitted,
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No. 83-475

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OCTOBER TERM, 1983

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v.

THE STATE OF OKLAHOMA,
Respondent.

On Petition for a Writ of Certiorari to the
Oklahoma Court of Criminal Appeals

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

1. It is important to note that Respondent does not dispute in any way the facts as set forth by Petitioners. In particular, Respondent does not challenge the fact that the motivation of local officials, including the police, was to diminish and control media coverage of the demonstration because of their desire to avoid publicity that they regarded as embarrassing to themselves and to the nuclear power industry. Respondent also does not contest the fact that Petitioners followed, rather than led, others onto the property, were never participants in the demonstration, were peaceable in all respects, and entered the property solely for the purpose of covering a news event.

2. The cases cited by Respondent (Opp. 5-9) have either been dealt with by Petitioners or are ones with

which the Court is fully familiar. Most of these cases support Petitioners' position, and the explicit findings by the trial court that the local officials limited press access for a censorial purpose render inapposite the remaining cases cited by Respondent (*see* Pet. 12-13). In total, they lodge this case in the mainstream of efforts by local officials to censor the press.

3. Thus, the only issues raised by Respondent are cast in the form of a parade of hypothetical horrors Petitioners' arguments will supposedly call forth. For example, Respondent asks how police officers can be expected to deal with the exigencies of crowd control (Opp. 9-10). But the answer is quite simple, because this type of problem has been dealt with by the police on innumerable occasions in countless jurisdictions. Members of the press are normally known to the police or can easily identify themselves prior to the event to be covered. If there is no opportunity for recognition or identification because of the exigencies of the situation, an initial arrest may be necessary. That does not mean, however, that when proper identification is subsequently made, and it is established that members of the press did not independently break the law (for example, by smashing windows) rather than simply cover a newsworthy event, those persons can be prosecuted. The situation is similar to ones that take place every day in which police authorities allow members of the press to cross barriers, police lines, barricades and the like at fires, accidents, disasters, or other newsworthy events. As for police concern about false or unjustified arrests, the courts have had no problem in dealing with this kind of concern under analogous circumstances in the past. *See, e.g., Harlow v. Fitzgerald*, 457 U.S. 800, 813-820 (1982); *Pierson v. Ray*, 386 U.S. 547, 555-558 (1967).

Respondent raises the question as to who qualifies as a newsperson. But here again, this is the type of decision that police make every day—from Presidential news con-

ferences to courtrooms of limited size. The question of who is protected by the First Amendment is an age-old one that presents no new wrinkles within the context of this case. And limitations on the number of press representatives who can cover an event have always been upheld where circumstances require it and the limitations are not imposed to prevent coverage of the event. *See, e.g., Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 n.17 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581-582 n.18 (1980) (plurality opinion of Burger, C.J.).

Respondent asserts that the Court would have to engraft a new requirement onto the Oklahoma trespass statute. Quite to the contrary, the state statute would remain unfettered, but it obviously cannot be enforced in a way that violates the First Amendment. Respondent's contention is analogous to saying that a state statute regulating the distribution of leaflets in airports would have to be judicially "amended" if the courts imposed First Amendment restrictions on the enforcement of that statute. Trial courts have proven able in the past to limit a State's trespass laws in the manner Petitioners suggest. *See, e.g., Freedman v. New Jersey State Police*, 135 N.J. Super. 297, 343 A.2d 148 (1975).

Finally, Respondent raises the spectre of a press intruding upon a private citizen whose home has been burglarized. Of course, that hypothetical has no relationship to this case. But, in addition, private property has always been recognized as having peculiar attributes in the law that are not applicable to public or quasi-public property. *See, e.g., Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 83-84, 87 (1980). Respondent does not contend that the property in question here was private. In addition, the law has also recognized the difference between newsworthy events and those that are relatively stale. *See, e.g., Restatement (Second) of Torts* § 652D and Comments d-g, at 388-391 (1977). To compare the fol-

lowing of demonstrators by the press onto property during the course of a *bona fide* news story, such as the demonstration here, with an invasion of someone's home by anyone after a burglary has taken place and the police have left (Opp. 11), is simply to point out the difference between protected and unprotected media coverage.

For the foregoing reasons, and for the reasons in the Petition, the Petition should be granted.

Respectfully submitted,

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